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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1173.

S. D. MILLER, E. B. MILLER, JOHN W. MILLER, AND SUSAN MILLER,

PLAINTIFFS IN ERROR,

vs.

THE NATIONAL BANK OF LANCASTER, AND JOHN MEYER.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED DECEMBER 2, 1882.

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1 Commonwealth of Kentucky. The Court of Appeals.

Pleas before the Hon. Joseph H. Lewis, Chief Justice, and Thomas F. Hargis, Thomas H. Hines, and Wm. H. Prior, Judges of the Court of Appeals of the Commonwealth of Kentucky, at the Capitol, in the City of Frankfort, on the 15th day of June, 1882.

S. D. MILLER, E. B. MILLER, JOHN W. MILLER, AND SUSAN MILLER, Appellants,
against
THE NATIONAL BANK OF LANCASTER AND JOHN MEYER, Appellees.

Appeal from Lincoln Circuit Court.

Be it remembered that heretofore, to wit: on the 28th day of July, 1881, the appellants filed in the office of the clerk of the Court of Appeals for the Commonwealth of Kentucky, transcript of the record of the Lincoln circuit court in said cause, which is in the words and figures following, viz.:

2 Kentucky Court of Appeals.

S. D. MILLER, &c., Appellant.
vs.
THE NATIONAL BANK OF LANCASTER, &c., Appellee.

It is agreed by the parties hereto, that on the 11th day of January, 1881, a summons, in all respects regular and proper, issued on the petition in this case from the clerk's office of the Boyle circuit court, directed to the jailor of Boyle county, against the defendant John Meyer, upon which was endorsed the same order of injunction which appear on page 16 of the record hereto attached, and that said summons and order of injunction were on that day served upon said John Meyer by the said jailor handing him a true copy of same, and were returned to the said clerk's office, but have by some means been lost or mislaid.

This, July 26th, 1881.

S. W. MILLER, &c.,
Appellants.
By W. O. BRADLEY, *Attorney.*
DURHAM JACOBS.
ANDERSON & HERNDON,
For Appellees.

3 State of Kentucky, Lincoln Circuit Court.

Pleas before the Hon. M. H. Owsley, Judge of the Lincoln circuit court, at the Court house in Stamford, Lincoln county, Kentucky, on the 15th day of April, 1881.

S. D. MILLER, E. B. MILLER, JNO. W. MILLER, Plaintiffs,
against
JOHN MEYER, THE NATIONAL BANK OF LANCASTER, Defendants.
} Petition in Equity.

Be it remembered that heretofore, on the 11th day of January, 1881, the plaintiffs filed in the clerk's office of the Boyle circuit court the following petition, afterwards transferred to the Lincoln circuit court.

Boyle Circuit Court.

S. D. MILLER, E. B. MILLER, J. W. MILLER, Plaintiffs,
against
JOHN MEYER, THE NATIONAL BANK, OF
4 LANCASTER, Defendants.
} Petition in Equity.

The plaintiffs state that they are children of S. W. Miller, deceased, who departed this life intestate as to the lands hereinafter described, in Boyle county, Ky.; and at the time of his death the plaintiffs, S. D. Miller and E. B. Miller, were in possession of the land hereinafter described as tenants of the said S. W. Miller, and the plaintiff, John W. Miller, is now, and has been for the last thirty days, in the possession thereof; that the said S. W. Miller, on the 11th day of October, 1879, made a conveyance to M. J. Durham of certain lands in Boyle county and other property embracing the land hereinafter described, by which he attempted to vest said Durham with title thereto in trust for the purpose of selling the same and paying off his the said S. W. Miller's indebtedness; that said Durham did make sale of said lands on the 7th day of August, 1880, and that the First National Bank of Danville became the purchaser of a large tract of land, embracing the lands hereinafter described, at and for the price
5 of $12,110, that the said First National Bank of Danville has conveyed the said land of the defendants, the National Bank of Lancaster, both said banks being banking corporations, organized under the act of Congress of the United States, entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3, 1864, and amendments thereto. They state that said land, nor any part thereof, was or is necessary for the immediate accommodation in the transaction of its business of the said National Bank of Lancaster.

Nor was said land or any part thereof ever mortgaged to the

defendant, the National Bank of Lancaster; nor was said land or any part thereof conveyed to said defendant bank in satisfaction of debts previously contracted by said S. W. Miller in the course of its dealings.

Nor was said land or any part thereof purchased by said National Bank of Lancaster at a sale under judgment, decree, or mortgage, held by the def't, the National Bank of Lancas-
6 ter, nor was it purchased to secure debts due to it by the said S. W. Miller.

They state that the purchase so made by the def't, the National Bank of Lancaster, was so made on the 28th day of Sept., 1880, in the lifetime of said S. W. Miller; that the said purchase was illegal, contrary to public policy, prohibited by its charter, and was and is void, and said bank is incapable of taking or holding the same; yet the plaintiffs allege that on the 5th day of January, 1881, the def't, the National Bank of Lancaster, caused a writ to be issued by the clerk of this court, commanding the def't, Meyers, as sheriff of Boyle co., to take the possession of said land from the pl'ffs, and put M. J. Durham, trustee, af's'd, in the possession thereof, which writ the said Durham, as trustee, on the following day, transferred and assigned by written endorsement to the First National Bank of Danville, and the said First National Bank of Danville, by written endorsement,
7 transferred and assigned the same to the def't, the National Bank of Lancaster, on the 8th January, 1881, without recourse, who, through the sheriff aforesaid, in whose hands said writ now is, is now about to take possession of the land hereafter set out; and they state that unless your honor should grant them an injunction immediately, preventing them from so doing, irreparable injury will result to the plaintiff. They state that an injunction has not been refused them by the court. They charge that the said writ issued herein, as aforesaid, is without authority and void—

1st. Because it does not pursue the judgment under which it is ordered, being joint instead of several. Said judgment was rendered at the 9th of the March term, 1880, in the suit of said Durham, trustee, *vs.* S. & S. W. Miller, &c., in this court, and is referred to as part hereof.

2d. Because no return day is fixed in the said writ.

3d. Because after the rendition of the said judgment another judgment was rendered in said action, to wit, in September, approving a deed made (on the 6th day of the Sept. term,
8 1880,) by said Durham, as trustee aforesaid, to the land hereinafter set out and reciting:

"That all the right, title, and interest of said S. W. Miller and M. J. Durham, his trustee, do now pass and vest in the 1st National Bank of Danville."

4th. They charge that the said writ is unknown to the law.

5th. They file herewith, as part hereof, a copy of the said writ, and refer to same for the boundary of the lands sought to be taken from the said pl'ffs, and for that purpose alone make it a part hereof. They state that the boundaries set forth in the writ are not those set forth in the judgment awarding the writ of *habere facias*, and for this reason they charge it is void. They charge that said John W. Miller was not a party to the suit for the settlement of the trust aforesaid, and is in no way bound by any of said proceedings; they further charge that said John W. Miller is not a member of the families either of S. D. or E. B. Miller, but lives several miles away from them, and that
9 he was in no way privy to the said action.

The endorsements aforesaid are on the original notice.

To the end that equity may be done in the premises the pl'ffs, Jno. W. Miller, S. D. Miller, and E. B. Miller, pray that def'ts be restrained and enjoined from taking possession of said land or any part of it under the writ aforesaid, that the said writ be quashed and held for nought, that their injunction herein be perpetuated against the said National Bank of Lancaster and all other persons, and their possession quieted; they pray judgment for cost against the def'ts, and finally pray for all proper relief.

W. D. HOPPER & H. O. BRADLEY,
Att'ys for Pl'ffs.

The plaintiffs, John W. Miller, S. D. Miller, and E. B. Miller, say the statements of the foregoing petition are true.

This January 10th, 1881.

JOHN W. MILLER.
S. D. MILLER.
E. B. MILLER.

Subscribed and sworn to before me by John W. Miller
10 this January 10th, 1881.

M. H. OWSLEY,
Judge Judicial District for Kentucky.

Order granting injunction.

Having inspected the foregoing petition, I hereby grant an injunction in favor of Plff's S. D. Miller, John W. Miller, and E. B. Miller against John Meyer, sheriff of Boyle county, Ky., the National Bank of Lancaster, and all other persons enjoined, restrained, and inhibiting them from taking possession of the land in the pleading and writ mentioned, or any part thereof, until the further order of this court. This injunction will be issued by the clerk of Boyle circuit court, but will not be issued or become effectual until the plaintiffs in the foregoing action shall

execute in his office a bond with good security in the penalty of seven hundred and fifty dollars, conditioned that the plaintiffs will pay to the defendants the damage not exceeding said sum, which they may sustain if it should be finally decided that the injunction ought not to have been granted, this January 10th, 1881.

11 M. H. OWSLEY,
Judge 8th Judicial District for Kentucky.

STATE OF KENTUCKY, *Boyle Circuit Court.* } *ss*:

As clerk of the Boyle circuit court I have this day issued the injunction prayed for, the bond as required in order granting injunction having been given with J. M. Higginbotham as surety.

Given under my hand this 11th January, 1881.

J. S. CHRISMAN, *Clerk.*

The writ referred to in the petition and made part thereof and filed therewith is in words as follows:

Boyle Circuit Court.

M. J. DURHAM, as Trustee of S. W. MILLER,
vs.
S. W. MILLER, &c. } Writ.

Writ of possession.

The Commonwealth of Kentucky to the Sheriff of Boyle County:

In pursuance to a judgment of the Boyle circuit court rendered at its March term, 1880, you will forthwith take from the parties now in possession, S. D. Miller and E. B. Miller, and de-

12 liver to said M. J. Durham, as trustee of said S. W. Miller, the following described tracts or parcels of lands and houses, to wit:

One field of land containing about thirty acres, and which is known as the "Long field," on the home place. One field containing about ten acres, and known as the Pond Woods field, on the home place. One field containing about ten acres, and known as the "Little Meadow," on the Hutching place. One field containing about twenty acres, and known as the "Sallie Elliott" field, on the home place. One field containing about ten acres, and known as the "Bailey field," on the home place. One field containing about twenty acres, and known as the Old Meadow field, on the home place. One field containing about forty-five acres, and known as the field adjoining Mullin's land, on home place. One field containing about thirty-five acres, and which lies just immediately back of the mansion home now occu-

13 upied by S. W. Miller. Also one field containing about ten acres, and known as the Jesse Fox Field, on the Hutch-

ing place. Also the house and yard and stable and lot just opposite the distillery on the turnpike road, and now occupied by defendant Ed. B. Miller. Also the house and yard and stable and lot and garden now occupied by defenant S. D. Miller.

Said houses and lands are embraced in the following boundary: Beginning at a point in the middle of Dix river westerly from the dwelling-house, and running thence S. 84 E. 14 poles to a walnut tree close by the fence; thence S. 15 E. 22 poles; thence N. 48 E. $53\frac{20}{100}$ poles to a point on the north side of the lane near the house; thence with the lane S. 39 E. $50\frac{72}{100}$ poles to a slight angle in the lane; thence N. $53\frac{1}{4}$ E. $210\frac{80}{100}$ poles to a high water mark on the north side of Dix river, and ten poles east of the mouth of Boones creek; thence with the meanderings of the cliff of Dix river, and at higher water mark on the north side of the river in a westerly direction to the ford
14 of the rivers at the mouth of the creek; thence S. 7 E. to the middle of the rivers; thence with middle of the river bed to the beginning, containing (138) one hundred and thirty-eight acres.

3d. The following: Beginning at high-water mark, on the north side of Dix river, ten poles up the river from the mouth of Boone's creek, and running thence S. $53\frac{1}{4}$ W. $210\frac{80}{100}$ poles to north side of the lane; thence S. 27 E. 52 poles; thence leaving lane, N. 76 E. $176\frac{64}{100}$ poles to the eastern cliff of the river at high-water mark; thence with the same in its meanderings at high-water mark, down the river to the beginning, containing (100) one hundred acres.

4th. The following: Beginning at a point on the east side of Dix river, at high-water mark corner, to (3d) and running thence S. 76 W. $176\frac{64}{100}$ poles to the lane; thence with same S. 27 E. 42 poles to a large black oak tree at the mouth of the lane; thence with road on cliff S. 53 W. $19\frac{60}{100}$ poles; thence S. 55 W. 32 poles to the middle of the pike; thence with middle of the
15 same N. 68 E. $54\frac{80}{100}$ poles to a sycamore stump near the water's edge below the bridge; thence across the river S. 40 E. $9\frac{30}{100}$ poles; thence with the meanderings of the river at high water mark on the eastern margin, down the rivers to the beginning, containing (100) one hundred acres.

5th. The following: Beginning in the middle of the rivers, same point as (1st), and running thence S. 84 E. 14 poles to a walnut tree; thence S. 15 E. 22 poles; thence N. 48 E. $53\frac{21}{100}$ poles to the lane near the dwelling-house; thence with the lane S. 39 E. $50\frac{72}{100}$ poles; thence S. 27 E. 94 poles to a large black oak tree near the mouth of the lane; thence S. 53 W. $19\frac{60}{100}$ poles along dirt road; thence S. 55 W. 32 poles to the middle of the Danville and Lancaster pike; thence with the same S. 68 W. $26\frac{16}{100}$ poles to a point in pike a few feet south the corner of

the warehouse; thence N. 27 W. 16 poles, passing through a small black walnut tree near the southeast corner of the warehouse, and also through a large sugar tree near the far
16 corner of the lot; thence N. 68 E. 3 poles; thence N. 37 W. 140 poles to the middle of Dix river; thence with middle of same up the rivers, with its meanderings, to the beginning, containing 78 acres, 2 roods, 31 perches.

6th. The following: Beginning in the middle of Dix river and at the west corner of the above-described lot of land, (5th,) and running thence S. 37 E. 140 poles; thence S. 68 W. 3 poles; thence S. 37 E. 16 poles to the middle of the pike; thence with the same S. 68 W. 13 poles; thence with the same S. 59 W. $65\frac{60}{100}$ poles to corners Caver land; thence with Caver line N. 37 W. 144 poles to middle of the rivers; thence with meanderings of same up the river to the beginning, containing (70) acres.

Given under my hand, as clerk of said court, this 5th Jan'y, 1881.

J. S. CHRISMAN, *Cl'k.*

A copy.

Att:

J. S. CHRISMAN, *Cl'k.*

The following is the injunction bond executed by pl'ff:

17 The Commonwealth of Kentucky. Boyle Circuit Court.

S. D. MILLER, &c., Plaintiff,
vs.
JOHN MEYER &c., Defendant. } Bond.

Injunction Bond.

We undertake that the plaintiff, S. D. Miller, E. B. Miller, John W. Miller, shall pay to defendants, John Meyer, The National Bank of Lancaster, the damage, not exceeding seven hundred and fifty dollars, which he may sustain by reason of the injunction in this action, if it is finally decided that said injunction ought not to have been granted.

This 11th day of January, 1881.

JOHN W. MILLER, [SEAL.]
S. D. MILLER,
E. B. MILLER,
J. M. HIGGINBOTHAM,
By J. M. MILLER, *Agent and Attorney in fact for S. D. Miller, E. B. Miller, and John M. Higginbotham.*

Attest:
J. S. CHRISMAN, *Clerk.*

The following is the power of atterney given by S. D. Miller and E. B. Miller to J. W. Miller to sign their name to said bond.

18 *Power of Attorney given by S. D. and E. B. Miller.*

We authorize and direct John W. Miller to sign our names to the injunction bond to be given by us, in the Boyle circuit court, in the case of ourselves against John Meyer and the National Bank of Lancaster.

January 11, 1881.

S. D. MILLER.
E. B. MILLER.

The following is also the power of attorney given by J. M. Higginbotham to sign his name:

Power of Attoruey given by J. M. Higginbotham.

I authorize John W. Miller to sign my name as security to an injunction bond, to be given by him and others, in the Boyle circuit court, in the case of S. D. Miller, John W. Miller, and E. B. Miller against John Meyer and The National Bank of Lancaster, said signature to be as binding upon me as if done by me in person. The penalty of said bond to be seven hundred and fifty dollars.

January 11, 1881.

J. M. HIGGINBOTHAM.

Attest:
W. D. HOPPER.

The following is a synopsis of the summons:

The Commonwealth of Kentucky, to the Sheriff of Garrard County:

19 *Summons.*

You are commanded to summon John Meyer, the National Bank of Lancaster, to answer on the first day of the next February term of the Boyle circuit court, a petition in equity, filed against them in said court by S. D. Miller, E. B. Miller, John W. Miller, and warn them that upon their failure to answer the petition will be taken for confessed, or they will be proceeded against for contempt, and you will make due return of this summons on the first day of the next February term of said court.

Given under my hand as clerk of our said court this 11th day January, 1881.

J. S. CHRISMAN, *Clerk.*

On which the following endorsement was made:

The defendant John Meyer, Sheriff of Boyle county, Ky., The National Bank of Lancaster, and all other persons are enjoined, restrained, and inhibiting them from taking possession of
20 the land in the pleadings and writ mentioned, or any part thereof till the further order of the court.

January 11, 1881.

J. S. CHRISMAN, *Clerk.*

Officer's return on same is as follows:

Officer's Return.

Executed on the within named National Bank of Lancaster, by giving George Denny, Sr., President of said Bank, a true copy of the within summons.

January 12, 1881.

J. M. HIGGINBOTHAM, *S. G. Co.*

And afterward, on the 7th day of February, 1881, the defendants filed their answer and counter-claim herein, as follows:

Boyle Circuit Court.

S. D. MILLER, E. B. MILLER, JOHN W. MILLER, Plaintiffs,
against
JOHN MEYER, THE NATIONAL BANK OF LANCASTER, Defendants.

Answer and Counter Claim of the National Bank of Lancaster against the Plaintiffs, S. D. Miller, E. B. Miller, John W. Miller, and against Susan Miller.

The Defendant, the National Bank of Lancaster, not waiving its demurrer, but insisting on the same for answer to plain-
21 tiffs' petition, and by way of counter claim against the plaintiffs and Susan Miller, also made party to the counter claim, says:

It is true plaintiffs are the children of S. W. Miller, deceased. It is not true that said S. W. Miller, deceased intestate as to the land in the petition mentioned. He was not the owner of said land or any part thereof, at the time of his death. It is true that said S. D. Miller and E. B. Miller occupied and were in possession of said lands at the date of the death of said S. W. Miller, but they had entered upon and taken possession thereof under a lease made by said Miller prior to the conveyance of said lands made by him to M. J. Durham, and their term expired on the 31st day of December, 1880. It is true that said Durham made

sale of the large tract of land embracing the land mentioned in the petition, and that the First National Bank of Danville became the purchaser thereof (but said sale was not made
22 by said Durham as trustee under said conveyance, but as special commissioner of this court, and under judgment thereof duly made and given in the action pending in this court of S. W. Miller, trustee, against S. W. Miller and others, directing and ordering the sale of said land). The sale made by said commissioner was reported in writing to said court, and was ratified and approved by judgment of said court, duly given in said action at its September term, 1880, at which term said First National Bank of Danville, having under judgment of the court, paid its bonds given for the purchase money bid at said commissioner's sale, a deed was made to said bank under judgment of this court, duly given in said action by J. S. Chrisman as special commissioner, (and not by M. J. Durham, trustee, as stated in their petition) for and on behalf of said S. W. Miller and M. J. Durham, his trustee, conveying to said bank a complete fee simple title to the tract of land purchased by it as aforesaid, and
23 which embraced the lands in the petition mentioned. This deed was executed by and acknowledged by the Commissioner before said court at its said term, and at said term examined and approved by the court and so endorsed, and then it was adjudged by said court that all the right, title, and interest of said S. W. Miller and M. J. Durham, as his trustee, should pass to and vest in said First National Bank of Danville, and said deed ordered to be recorded in the Boyle county court clerk's office, and which has been duly done. It is true that said First National Bank of Danville, by its deed duly execcted, acknowledged and delivered, have conveyed a part of said tract of land to this defendant, and which embraces the land in petition mentioned, and this deed has been duly recorded in said clerk's office. It is not true that said Miller merely attempted to vest said Durham with the title to said land, but by his said deed he did convey and vest his title in and to said lands in said
24 Durham, and said Durham accepted said deed and the trust therein created, and in the Boyle county court, (the said deed from S. W. Miller having been duly recorded in the clerk's office of said court) accepted said trust, and therein duly qualified as assignee or trustee under said deed by taking the oath and giving the bond required by law, with surety in the bond approved by the court. It is true that said land was not purchased by the defendant to secure a debt or debts due it by S. W. Miller, but defendant avers it was purchased by it, and its purchase was necessary to secure a large debt it had on the defendant, John W. Miller, previously contracted by him with defendants in the due and legitimate course of its business, and the

facts in regard to which are fully set forth in the second paragraph of this answer. Defendant denies that its purchase of said land was illegal or contrary to public policy or prohibited by its charter, or was and is void, or that it is incapable of taking or holding the same.

25 It is true that Jno. W. Miller was not a party to said suit, but it is not true that he is not bound by the judgment and proceedings therein, or that he is in no way a privy thereto; said S. D. and E. B. Miller were party defendants to said action, and they and said Jno. W. Miller *laid* no claim to said land except a pretended claim in their supposed right as children and heirs of said S. W. Miller; whether or not said writ issued for possession of said land is illegal and void were facts stated in petition is a question of law. Defendants submitted to the court, but def't denies that plaintiff had any title to said land mentioned in the petition, or any part thereof, but the whole of said lands any every part thereof belongs to this defendant, wherefore defendant prays, &c.

2d. Defendant for answer and counter claim against the plaintiff and Susan Miller says, that said S. W. Miller, being largely indebted to various persons, among others to the First National Bank of Danville, and beyond his ability to pay, on the 11th

26 day of October, 1879, by his deed of that date, duly subscribed and executed by him and delivered to M. J. Durham, and duly acknowledged before the clerk of the Boyle county court, conveyed to said Durham all of his estate, real and personal, not exempt from execution for debt in trust, to sell the personal property and to sell and convey the real estate, and after paying costs, expenses, fees, and allowances connected with the making and execution of the trust, to disburse the residue of the proceeds among his creditors in certain ways and manners pointed out as specified in the deed. Said deed contained clause of general warranty of the title of the property therein conveyed, and much the greater part of the real estate conveyed in said deed, and also of the personal property, being situated in Boyle county, said deed was duly recorded in the Boyle county court clerk's office, and said Durham having accepted said conveyance and the trust therein created, appeared in the Boyle county court at its term 1879, and duly qualified therein as trustee

27 under said deed by taking the oath and executing the bond required by law, with surety in the bond approved by said court. Among other property conveyed by said deed to said Durham was a tract of land containing about five hundred and fifty acres, of which said Miller was then the owner, and the much greater portion of which tract is situated in Boyle county, a small portion being in Garrard county. In this tract of land said Miller reserved such portions as he might be entitled to for

homestead. After the qualification of said Durham as trustee under said conveyance as aforesaid, for purpose of procuring a settlement of said trust and a sale of the real estate situated in this State, under the order and judgment of this court, he instituted on the 20th day of Jan'y, 1880, his action in this court against said S. W. Miller and part or all of the creditors of said Miller, and in this action, styled on the docket of this court S. W. Miller's Trustee against S. W. Miller's Creditors, said S. W. Miller filed his answer, claiming an allotment of homestead
28 out of said tract of about five hundred and fifty acres of land, and under orders and judgments of the court duly made a portion thereof, was allotted to said Miller for homestead, which was accepted by him and ratified and approved by judgment of the court, and a judgment in said action was duly given and made by said court at its term 1880, ordering and directing the sale of the residue of said tract of land, containing about acres, (and appointing a commissioner to make the sale). The commissioner, under and in accordance with said judgment, made public sale of said land on the day of 1880, at which sale the First National Bank of Danville became the purchaser thereof, and the commissioner, having made and filed in said action his written report of said sale, by judgment of said court duly made and given at its Sept. term 1880, the report was approved and said sale was ratified and confirmed, and said bank having under permission of a judgment of said court paid
29 its bonds for the purchase money given at the commissioner's sale, a judgment was duly given by said court in said action at its said term, directing a deed to be made to said bank by a special commissioner for and on behalf of said Miller and said Durham as his trustee, to said tract of land purchased by said bank at said sale. The deed so ordered was made and acknowledged in open court by the commissioner appointed to make the same at said Sept. term, and at said term was examined and approved by the court, and so endorsed and ordered to be certified to the clerk of the Boyle county court for record, and by said judgment duly made and given it was adjudged that all the right, title, and interest of said Miller and Durham, as his trustee, in said tract of land pass to and vest in said bank. Said deed has been duly recorded in the Boyle county court clerk's office.

After said deed was made to said bank by its deed duly made, executed, acknowledged, and delivered, it conveyed a part
30 of said tract of land to this defendant, and said deed to this def't has also been duly recorded in said clerk's office, said First National Bank of Danville purchased said land at said commissioner's sale for purpose of securing debts due to it by said Miller, previously contracted, and for all of which it

had, previous to the making of said deed of trust by said Miller to Durham, duly obtained judgment against said S. W. Miller in the Boyle court of common pleas, and to secure which all executive liens existed on said lands prior to the making of said deed of trusts. These judgment debts of said bank and the liens on said lands under the executions issued thereon were recognized in and further secured by said deed of trust; said bank was a party defendant in said action of S. W. Miller, trustee, against S. W. Miller's creditors, and asserted in said action its said debts and liens, and same were adjudged valid by judgment of this court, duly given in said action, said S. W. Miller not only did not except to the report of sale of said land to said bank,
31 but consented to and requested the court to confirm the sale. Before the purchase by this def't of portion of said land conveyed to it, it held, and now holds, a large debt against plaintiff, Jno. W. Miller, amounting, with interest to over twelve thousand eight hundred dollars; and this inebtedness had been contracted by said Miller with this defendant in the due and legitimate course of its business, and said First National Bank of Danville also held large debts on said Jno. W. Miller, contracted by him with it in the course of its legitimate business, said John W. Miller, being also largely indebted to other persons, and much beyond his ability to pay, had, some time prior to said purchase of said purchase of said land by defendant, conveyed all of his estate not exempt from execution for debts to one Jas. A. Beazley for benefit of his creditors, and said debts of defendant and of said bank were just and valid debts and claims against said trust estate, and had been duly presented to the trustee properly proven and verified. The estate of said
32 J. W. Miller, conveyed as aforesaid, was and is wholly insufficient to pay his own indebtedness, and will not pay a dividend on his indebtedness beyond thirty or forty cents on the dollar. All other persons who are and were liable with said Jno. W. Miller on said debts to this defendant were before and at the time of said purchase of said land by defendant insolvent, and before and at the time of said purchase it was plainly manifest to defendant's officers that it could not make its said debt out of the persons liable thereon or out of their estate, but that it would loose a considerable part thereof; and def't avers that loss of part of its debts aforesaid, in consequence of the facts stated, was inevitable under these circumstances. Def't made a contract with said First National Bank of Danville whereby, for a consideration paid by defendants, which defendants' officers believed to be, and which def't avers was not beyond the fair market value
33 of the land, and which consideration or price, if not more, def't's officers believed in good faith could be realized on a re-sale of the land, said First National Bank conveyed to def't

part of the land purchased by it at said commissioner's sale, and as a part of the agreement of the sale and purchase of said land—and without which it would not have been made—assigned and transferred to def't its debt and claims on said Jno. W. Miller. In this way def't became entitled to receive the dividends thereon declared from the trust estate of said Miller, in the hands of said Beazley, and would be enabled to receive a greater part of its own debt before held on said Miller than it otherwise could do. Said contract for the purchase of said land and the transfer of said claims of the First National Bank was made by deft's officers in good faith for the purpose of securing its said debts on said John W. Miller, and with the view and intention on the part of this def't to a subsequent speedy sale of said land and conversion into money. Said tracts of land, con-
34 veyed as aforesaid to def't, embrace all of the lands mentioned and described in the petition, and is but one tract, & described as follows, situated in Boyle county: Beginning in the middle of the Danville and Lancaster turnpike and corner to case, and running thence with case and the Hampton line N. 37 W. 144 poles, to the middle of the bed of Dix river, thence with same N. 73 E. 28 poles, thence N. 60 E. 32 poles, thence N. 30 E. 24 poles, thence N. 5 W. 56 poles, thence N. 7 E. 40 poles, thence N. 35 E. 20 poles, thence with the meanders of said rivers at high-water mark, and including said river up and around the same to a point near the iron bridge, thence crossing the river N. 40 W. $9\frac{20}{100}$ poles, to a sycamore tree, thence with the line of the middle of said turnpike road S. 68 W. 84 poles, thence with middle of same S. 59 W. $65\frac{60}{100}$ —, to the beginning, and containing four hundred and eighty-six acres, two roods, and thirty-one poles. This defendant is the owner and entitled to the immediate possession of the whole of said land, and
35 plaintiff and Susan Miller, made def'ts to this counter-claim, are in possession thereof without right and *lean* unlawfully, and without right detain possession thereof from defendant since the day of , 188 . Defendant avers that plaintiff and said Susan Miller—and no one heard of them—have any right, title, or interest in said tract of land, or any part thereof, and their sole pretense of any claim to possession thereof, or any part thereof, is asserted and claimed as heirs-at-law, and representative of said G. W. Miller, and not otherwise,) said parties, and no one of them, have any claim, or have ever asserted any claim, to said land, or any part thereof, adverse to said G. W. Miller, said Durham, trustee, or said First National Bank of Danville. The First National Bank of Danville is a banking corporation located and doing business in

Danville, Kentucky, and the def'ts is a banking corporation located in and doing business in Lancaster, Kentucky.

36 The record and all proceedings had in said action of S. W. Miller, trustee of Mrs. S. W. Miller's creditors, are made part hereof. Wherefore, in view of the allegations and statements above made, defendant prays that plaintiff's petition be dismissed, and for judgment for recovery of possession of said tract of land, and $, its damages for being unlawfully kept out of possession, and for all relief, general and special, to which defendant may be entitled.

ANDERSON & HERNDON,
DURHAM & JACOBS,
For Defendant.

Geo. Denny, President of the National Bank of Lancaster, Ky., says that he believes the statements of the foregoing answer and counter claim are true.

Feb. 7, 1881.

GEO. DENNY, *Pres.*

Sworn to before me by Geo. Denny.
Feb. 7, 1881.

ROBT. RENNAIRD,
Notary Public for G. Co.

Summons vs. *Susan Miller on Counter-Claim.*

The Commonwealth of Kentucky to the Sheriff of Boyle County:

37 You are commanded to summon Susan Miller to answer on the first day of the next Feb. term of the Boyle circuit court, counter-claim in equity filed against her, &c., in said court by the National Bank of Lancaster, in case pending in said court of S. D. Miller, &c., *vs.* John Meyers, &c., and warn her that upon her failure to answer, the petition will be taken for confessed, or she will be proceeded against for contempt; and you will make due return of this summons on the first day of the next Feb. term of said court.

Given under my — as clerk of our said court, this 7th day of Feb., 1881.

J. S. CHRISMAN, *Clk.*

Upon said summons the following is the officer's return:

Officer's Return on Summons.

Executed on the within named Susan Miller by delivering to her a copy of within summons Feb. 8, 1881.

JOHN M. MEYER, *S. B. Co.*

1881, Feb. 24.—Filed his demurrer, and reply and demurrer are as follows:

Boyle Circuit Court.

S. D. MILLER and others
vs.
JOHN MEYER and others, Def't. } Plff. Demurrer and Reply.

38 Plaintiff for reply to defendant's answer and counter-claim, not waiving their demurrer, but insisting thereon, say they deny that S. W. Miller was not the owner of the land described in the petition at the time of his death. They deny that the purchase of the land mentioned in petition by the defendant, the National Bank of Lancaster, or any portion thereof, was necessary to secure a large debt or any debt it held on Plff., S. W. Miller, previously contracted by him with the said Def't in the due and legitimate course of its business or otherwise; deny that the date of the purchase said John W. Miller was indebted to the said def't in the $12,800 debt set out in the 2d paragraph of defendant's answer or any part thereof.

They deny that the whole of said land or any portion thereof belong to the def't, the National Bank of Lancaster. They deny that the Def't, the National Bank of Lancaster, was a party to or in any wise interested in the suit of S. W. Miller,
39 trustee, against S. W. Miller, a copy of the proceedings in said case here filed and made part hereof, which is referred to for the proceedings in said case, and all steps taken therein. They deny that at the date of the purchase of said land by the defendant, the National Bank of Lancaster, that either Sam'l W. Miller or Jno. W. Miller were indebted to the defendant, the National Bank of Lancaster, in the $12,800 debt set out in counter-claim, or any portion thereof, but they aver that said debt had been long prior thereto paid off and discharged, to wit, on the 21st day of January, 1879, and both said J. W. Miller and S. W. Miller relieved and discharged therefrom, and is the same and only debt owing by either or both S. W. Miller or John W. Miller as owing to the defendant, the National Bank of Lancaster, in paper dated January 21, 1879, marked O, and here filed and exhibited and made part hereof. They deny that at the date of the purchase of said land by said First National Bank of Danville or by the National Bank of Lancaster, that said
40 First National Bank of Danville, or said National Bank of Lancaster, held large or any debt or debts on said Jno. W. Miller, contracted in any manner whatever. They deny that said Jno. W. Miller had, some time prior to said purchase of said land, or at any other time, conveyed all of his estate not exempt from execution for debt to one James A. Beazley, for the

benefit of his creditors. They deny that the defendant, the National Bank of Lancaster, had any just or valid debt against the trust estate of S. W. Miller. Deny that defendant ever presented any claim against the trust estate of said S. W. Miller. They deny that said John W. Miller ever made a deed of trust to said James A. Beazley, or to any other person. It is true that said Jno. W. Miller, on the 21st day of January, 1879, sold to his creditors all of his property, including his homestead and his wife's contingent right of dower in and to his real estate, (reserving only a few articles of personal property,) in payment of his debts, which was
41 accepted by his said creditors, including the defendant, the National Bank of Lancaster, and the first National Bank of Danville, in full satisfaction and discharge of all his indebtedness, said conveyance here filed and referred to as part hereof, marked O. They deny that the estate of Jno. W. Miller did not or will not pay his indebtedness, or a dividend beyond 30 or 40 cents on the dollar; but on the contrary, they aver that said Jno. W. Miller's indebtedness was paid in full, as hereinbefore set forth. They deny that before or at the time of the purchase of said land by the defendant, the National Bank of Lancaster, or by the First National Bank of Danville, it was manifest to defendants' officers, or either of them, that it could not make its said debt out of the person liable thereon, or out of their estate; they aver that said debt had been long prior thereto paid off and discharged, to wit, on the 21st January, 1879. They deny that before or at the time of said purchase it was manifest that it (defendant, the National Bank of Lancaster,) would
42 lose a considerable part of its debt, or any part thereof, for the said debt had already been paid. They deny that a loss of part of defendant, the National Bank of Lancaster's debt was inevitable.

They deny that under the circumstances stated in def't's answer and counter claim def't made the contract with the First National Bank of Danville, as set out in the answer. They deny that the First National Bank of Danville, as part of the agreement of purchase of the land, assigned and transferred to defendant its debts and claims on said Jno. W. Miller. They aver that at that time said Jno. W. Miller was not indebted to said First National Bank of Danville, nor did said bank have any claim against him whatever.

They deny that in the manner or way alleged defendant became entitled to receive the dividends thereon declared from the trust estate of said Miller in the hands of said Beazley. They deny that the def't, the National Bank of Lancaster, would
43 be enabled to secure a greater part of its debt by reason of any assignment to them of any alleged claim held by the

said First National Bank of Danville on said Jno. W. Miller. They aver that the def't, the Nat'l B'k of Lancaster, has no power or authority to buy, take, or hold any such papers as it alleges it received from the First Nat'l Bank of Danville. They deny that said contract for the purchase of said land and the transfers of said claims on either of the First Nat'l Bank of Danville was made by def't's officers in good faith for the purpose of securing its said debts on said Jno. W. Miller. They again aver that Jno. W. Miller owed def't no debt, and they charge that said purchase was made purely as a matter of speculation and investment.

Whether the view and intention on the part of the def't was to a subsequent speedy sale of said land and conversion into money plaintiffs have no knowledge, nor have they sufficient information in regard thereto upon which to base a belief.

44 They deny that def't, the National Bank of Lancaster, is the owner or entitled to the possession of the whole or any portion of the land described in the answer.

They deny that they or either of them, or Susan Miller, are in possession of said land without right, or that they or either of them have unlawfully and without right detained possession thereof from def'ts from the day of , 188 , on any other time.

They deny that they have no right, title, or interest in said land.

They deny that they had no claim to said land, except a pretended claim in their supposed right as children and heirs of S. W. Miller.

Plaintiffs are advised and charged that the deed made by J. S. Chrisman, com'r to the First National Bank of Danville, did not pass or vest any title to the land mentioned and described therein to said bank; and the deed from said First National Bank of Danville to the National Bank of Lancaster did not pass

45 or vest any title to said land to said last named, and both of said deeds they are advised and charge are wholly nugatory and void.

They deny that they and said Susan Miller or no one of them have any right, title, or interest in said land or any part thereof; deny that their sole pretense of any claim to possession thereof or any part thereof is asserted and claimed as heirs-at-law and representatives of said S. W. Miller and not otherwise; but they aver that they are in the actual possession of said land, and they are advised and charged that the defendant cannot oust them or anybody else on its pretended claim of title herein.

They deny that no other one of them have any claim or have ever asserted any claim to said land or any part thereof adverse to M. J. Durham, trustee on said First National Bank of Danville.

Wherefore plaintiffs pray as in their original petition that defendant's counter-claim be dismissed, and for all proper
46 relief. W. O. BRADLEY,
W. D. HOPPER,
Attorneys for Plaintiff.

And on the same day, the 24th of February, 1881, the following deed and agreement was filed:

Deed and agreement of J. W. Miller to and with his creditors.

This deed and agreement this day entered into by and between John W. Miller and Cora P. Miller, his wife, of the first, and the National Bank of Lancaster, First National Bank of Danville, W. H. Kennaird, S. W. Miller and Susan Miller, his wife, W. P. Walden & Co., C. C. Storms, W. S. Miller, John W. Walker, J. W. Poor, Herring & Fisher, W. E. Walker, George Denny, and Denny & Kerby, of the second part, witnesseth: That whereas the said John W. Miller is indebted to the parties of the second part and others beyond his means of payment, and is, together with his said wife, entitled to a homestead in the place where they reside, and his said wife entitled to contingent right of dower in the real estate mentioned in this conveyance; and whereas the said John W. Miller desires to pay his debts as far as able, and the parties of the second part desire to obtain
47 his property hereinafter named free from encumbrance and apply same to their indebtedness without cost of suit; and whereas said parties of the second part have this day agreed with said John W. Miller that if he and his said wife will convey them the place where they reside, releasing their right to homestead therein, and that said John W. Miller will make full conveyance to certain mill property and leases hereinafter named and will give up all his personal property, save and except the portion thereof exempt by law from execution, and save also the provender and corn he now has on hand, together with his policy of life insurance, and all his notes and acts except such as pertain to the partnership of Miller & Farris, or such as pertain thereto or are connected therewith, and in addition to all this the said John W. Miller will retain the hotel property in Lancaster, Ky., together with all its appurtenances and the stable thereto attached, together with his portion of all the stock, provender, &c.,
48 &c., therein contained of every character whatever necessary to the running of the same, including vehicles, harness, &c., together with all the accounts and demands due or to become due the said firm of Miller & Farris, or due or to become due said Miller from said Farris or from the said firm, also the said tracts of land wherein said John W. Miller owns the life estate of Alexander Lusk and Barbara Salter, and in lieu

thereof will pay to the parties of the second part (except S. W. Miller) the sum of six thousand dollars ($6,000) in one, two, three, and four years in equal instalments bearing six per cent. interest from date until paid, the parties of the second part to sue (if they choose) at the end of any year when an instalment falls due in the event said John W. Miller should fail to pay any of said instalment for six months after the same falls due, then the parties of the second part are at liberty to sue for the whole amount of the indebtedness, said John W. Miller to
49 execute with even date herewith a mortgage to the parties of the second part upon the property retained for six thousand dollars aforesaid, a mortgage to be enforced as per terms of suit or instalments as aforesaid, and for the further consideration that said S. W. Miller, (one of the parties of the second part,) will agree with the remaining parties of the second part, that he will not look to them or to the property of said John W. Miller for reimbursement for any sum he has paid or may pay to the said First National Bank of Danville, as security for said John W. Miller, and will release them from payment of same, and will likewise release said John W. Miller from any and all liability in regard thereto, the said parties of the second part will forever acquit and release said John W. Miller from any and all indebtedness or liability to them, and will likewise forever acquit and release the said S. W. Miller from any and all indebtedness to them as security for John W. Miller, except the said First
50 National Bank of Danville, which it is understood does not release said S. W. Miller. Now the premises considered, we, John W. Miller, and Cora P. Miller, his wife, do hereby sell, release, and convey unto the parties of the second part (other than S. W. Miller) all the right, title, and interest in and to the tract of land (with all its building and appurtenances) whereon we now reside, lying on the Turnpike road leading from Lancaster to Danville, adjoining the lands of George Denny, John Duncan, John Russell, &c., the same conveyed said John W. Miller by said Denny, of deed recorded in the clerk's office of the Garrard county court, and containing a fraction more than fifteen acres, be the same more or less. The foregoing conveyance of the property just described, is made subject to a claim of twenty-five hundred dollars and interest, balance of purchase money going to said Denny. And for the consideration aforesaid the said party of the first part hereby conveys unto the party of the second part (other than S. W. Miller) all right, title, and interest in and to the mill property situated near the rail-
51 road depot, in the town of Lancaster, together with leases from James McMurtry and the executors of Seymore Hopper, deceased, and the portion of the note conveyed to said John W. Miller of E. Brown, without recourse however upon

said John W. Miller, all, however, subject to the payment of partnership debts in and about the said mill.

And the said John W. Miller hereby releases and surrenders unto the party of the second part (except S. W. Miller) his personal property aforesaid, (save and except the portion thereof heretofore especially retained by him in this instrument,) consisting of whisky, cattle, sheep, accounts, notes, &c., &c., in consideration of the foregoing premises.

And in like consideration of the premises, said John W. Miller, and Cora P. Miller, hereby expressly waive and release all claim to a homestead in the place where they live, and the said Cora P. Miller also relinquishes any and all contingent right to dower in the premises named. And for the consideration
52 named, said S. W. Miller acquits the parties of the second part and all the property aforesaid, from any and all contribution to him by reason of his suretyship aforesaid for said John W. Miller, and likewise acquits the said John W. Miller from all indebtedness or liability to him, and will forever *release* all claims against all the said parties as aforesaid. The parties of the second part do now, therefore, acquit and *release* said S. W. Miller forever from all indebtedness or liability to them or any of them except the First National Bank of Danville, by reason of his suretyship for said John W. Miller.

The said John W. Miller binds himself to pay to the parties of the second part (except said S. W. Miller) in one, two, three, and four years, from this date, in equal annual instalments, bearing 6 per cent. interest from this date until paid, the sum of six thousand dollars, under the terms and according to the conditions set out in the premises hereof, and has this day executed to
53 the parties of the second part (other than S. W. Miller) a mortgage upon the property of which the said six thousand dollars is the purchase price.

In consideration of said six thousand dollars, secured by mortgage as aforesaid, the said parties of the second part agree that the said John W. Miller shall retain the said hotel, situated in Lancaster, Ky., on the Stanford street of said town, together with all its appurtenances, the stable near to the same, together with all its appendages, the accounts and demands thereto appertaining, as set out in the premises hereof the land in which said John W. Miller purchased the life estate of Alex. Lusk, being situated near the town of Lancaster adjoining the lands of Abner Baker's estate, W. O. Bradley, John S. Gill, N. B. Anderson, &c., and the land in which said John W. Miller purchased the interest of Mrs. Barbara Salter, (being her dower,) situated on the Lancaster and Richmond turnpike road and adjoining the lands of John S. Arnold, John Duncan, Mrs. S. T. Lev-
54 ell and others. On this last named tract of land said W.

H. Kinnaird holds a lien for the purchase-money due by note of said John W. Miller and Thomas Peacock, which with interest now amounts to about one thousand dollars, which lien the said Kinnaird hereby releases to the extent of one-half of the said note, agreeing to look to the said Peacock therefor, in consideration of the premises aforesaid, now the parties of the second part, to wit: S. W. Miller, George Denny, W. H. Kinnaird, Susan Miller, wife of said S. W. Miller, W. P. Walden & Co., C. C. Storms, W. S. Miller, John W. Walker, J. W. Poor, W. E. Walker, Herring & Fisher, to wit: H. C. Herring and Elias Fisher; Denny & Kirby, to wit: W. M. Kirby & George Denny, M. J. Farris, President of the First National Bank of Danville, and Samuel Harding, R. S. Salter, John J. Craig, J. S. Bruce, Thomas McRoberts, and J. Harlan, Directors of First National Bank of Danville; George Denny, President of the National Bank of Lancaster, and G. W. Dunlap, James A. Beazley, A. R. Denny, Joe Burnside, J. S. Gill, C. J. Spilman, James H.
55 Bruce, W. R. Robinson, George Denny, Directors of said National Bank of Lancaster; the said President and Directors, for and in behalf of the said respective banks do hereby forever acquit and release the said John W. Miller from any and all indebtedness or liability of every character to them, or any of them, acknowledging full and complete payment of all indebtedness or liability from said John W. Miller to them, save and except the six thousand dollars aforesaid, and do likewise acquit the said S. W. Miller of any and all indebtedness or liability to them or any of them by reason of his suretyship to them or any of them for said John W. Miller, except the First National Bank of Danville, said John W. Miller is permitted to retain possession of the premises whereon he now resides until the first day of July, 1879. And the said parties of the second part (other than S. W. Miller) do hereby appoint James A. Beazley their true and lawful agent, attorney-in-fact, and trustee, to receive the
56 possession of all the property herein surrendered and conveyed, and hereby authorize him to sell the same publicly or privately, convey it to the purchaser or purchasers, collect all demands due them of every character, or that they may become due them by reason of this conveyance or the enforcement of the mortgage by Miller or by said sales, and when collected pay same to them *pro rata* after satisfactions of all prior liens, to bring any and all suits that may be necessary for the collection of any money due or to become due by reason of this conveyance or said sale; and the said party of the second part (except said S. W. Miller) do hereby fully ratify, approve, and confirm all the acts of their said trustee, and attorney-in-fact, within the scope of his authority, the same as if done by themselves, in proper person. Before said trustee and attorney-in-fact shall proceed to act he will

execute bond to the parties of the first and second parts (except S. W. Miller) for the faithful performance of his duties herein and deposit same with said W. H. Kinnaird for safekeeping, and will in the said bond give good security, to be approved by said Kinnaird.

It is distinctly understood that it is not the intention of said John W. Miller by the foregoing arrangement to prefer any of his creditors over others, and any creditor whose name has been omitted from this conveyance is to have his share the same as if his name were inserted herein.

In testimony of all which the parties of the first and second parts have this day signed their names hereto, this 21st day of Jan'y, 1879.

W. P. WALDEN & CO.,
per W. P. WALDEN.
FISHER & HERRING,
per E. FISHER.
W. H. KINNAIRD.

JNO. W. MILLER.
CORA P. MILLER.
S. W. MILLER.
SUSAN MILLER.
GEORGE DENNY.
J. W. WALKER.
ALEX. R. DENNY, *Director.*
J. W. POOR.
C. J. SPILMAN.
58 J. H. BRUCE, *Director.*
J. A. BEAZLEY, *Director.*
JOE BURNSIDE.
W. R. ROBINSON, *Director.*
C. C. STORM.
G. W. DUNLAP, *Director.*
W. S. MILLER, JR.
JNO. S. GILL, *Director.*
W. E. WALKER.
M. J. FARRIS,
President First National Bank, Danville, Ky.
JOHN J. CRAIG, *Director.*
J. S. BRUCE, *Director.*
SAM'L HARDING, *Director.*
THO'S McROBERTS, *Dir'r.*
J. W. HARLAN.
Directors First National Bank, Danville, Ky.
GEO. DENNY.
DENNY & KIRBY,
by GEO. DENNY.

STATE OF KENTUCKY, } *sct.*
County of Boyle. }

Certificate of County Clerk, Boyle County.

I, Reed S. Nichols, clerk Boyle county court, do certify that

the foregoing instrument of writing was this day acknowledged before me by M. J. Farris, as president of the First National Bank of Danville, and John J. , J. S. Bruce, Sam'l Harding, Tho's McRoberts, and J. W. Harlan, as directors of
59 said bank, to be the act and deed of said First National Bank of Danville, and to be their act and deed as president and directors aforesaid, all of which is certified to the proper officer for record.

Given under my hand this 8th day of February, 1879.

Attest:

REED S. NICHOLS,
Clerk Boyle County Court, Kentucky.

STATE OF KENTUCKY,
County of Garrard:

I, J. W. West, clerk Garrard county court, certify that the foregoing deed and agreement between Jno. W. Miller and wife and Geo. Denny, &c., was, on the 25th of January, 1879, signed and acknowledged by S. W. Miller to be his act and deed; and on 27th January, 1879, signed and acknowledged by J. W. Walker, Alex. R. Denny, J. W. Poor, C. J. Spilman, J. H. Bruce, J. A. Beazley, Joe Burnside, and W. R. Robinson to be their act and deed; and on the 29th January, 1879, signed and acknowledged by C. C. Storm, G. W. Dunlap, W. S. Miller, Jr., and John S. Gill; and on the 30th January, 1879, acknowledged by W. E. Walker; and on the 14th February, 1879, acknowledged by W. P. Walden & Co., per W. P. Walden, and on the 25th February, 1879, signed and acknowledged by Fisher
60 & Herring, per E. Fisher, and on the 27th February, 1879, signed and acknowledged by Denny & Kirby, per Geo. Denny, and by Geo. Denny, and by Geo. Denny as director, and on the 27th February, 1879, signed and acknowledged by Cora P. Miller, wife of Jno. W. Miller, in due form of law, to be her act and deed, and by Susan Miller, wife of Sam'l Miller, in due form of law, to be her act and deed. And on this day produced to me and acknowledged by W. H. Kennaird to be his act and deed, and the same was lodged in my office and entered to record. Whereupon the same, together with this certificate, has been duly admitted to record in my office.

Given under my hand this 3d March, 1879.

J. W. WEST,
Clerk Garrard County Court.

A copy.
Attest: J. W. WEST,
Clerk Garrard County Court.

And on the same day, the 24th of February, 1881, plaintiffs

filed demurrer to defendants' answer and counter claim, which is as follows:

Boyle Circuit Court.

S. D. MILLER and others, Plaintiffs,
61 *vs.* } Demurrer.
JOHN MEYER and others, Defendants.

Demurrer of plaintiffs to answer and counter-claims of defendants.

Plaintiffs demur to so much of def'ts answer and counter claim as states that pl'ffs have no claim to the land, except a pretended claim in their supposed right as children and heirs of S. W. Miller.

2d. To so much of def'ts answer and counter claim as denies that pl'ffs have any title to the land mentioned in the petition or any part thereof.

3d. They demur to so much of said answer as sets up a counter claim against Susan Miller, because same does not show any cause of action against plaintiffs and the said Susan Miller, which arises out of the contract or transaction stated in the petition as the foundation of plaintiff's claim, or which is connected with the subject of the action.

4th. They demur to all that portion of said answer which sets up the appointment of a special commissioner to make sale of the land, a sale of the land by special commissioner, and confirmation of such sale, because in conflict with the exhibits referred to.

62 5th. Because said answer and counter-claim does not state facts sufficient to constitute a defense or cause of action.

Wherefore they pray, &c.

W. O. BRADLEY,
W. D. HOPPER.

1881, Feb. 24, defendant filed rejoinder, as follows:

Boyle Circuit Court.

S. D. MILLER and others,
vs. } Rejoinder.
JOHN MEYER and others.

The defendant, the National Bank of Lancaster, Ky., denies that the debt of $12,800 from plaintiff, Jno. W. Miller, had been paid long prior to the date of the purchase by her of the land in controversy. The defendant submits to the court the paper exhibited in reply of date 21st Jan'y, 1879, and the effects thereof, and as to the extent of its acceptance.

So it is, she alleges, that the trusts assets realized and to be realized by Jas. A. Beazley, and the $6,000 named and re-

ferred to therein, is subjected to pro rata distribution among
63 the creditors of said Miller; and this defendant was, by the terms of the agreement with the First National Bank of Danville, substituted to all the rights of said last-named bank in and to her proportion of the trust fund in said $3,575.26, which thereby lessens defendant's loss on her original demand of $12,-800 against the trust fund to the extent of the *pro rata* of said First National Bank on her (then) said debt of $3,575.26. She denies that said debt had been paid in full, or at all, prior to the purchase of the land by defendant.

No distribution has ever been made of any part of the proceeds of the property embraced by the conveyance from Jno. W. Miller, dated 21st Jan'y, 1879, nor has any part of the trust fund been released from the payment of any of the indebtedness secured by the terms of said paper. She denies that she has (had) no power or authority to buy, take, or hold any such paper as she received from the said National Bank of Danville, or that said purchase by her was made purely as a
64 matter of speculation and investment, or that it was so made at all.

She denies that the deed made by J. S. Chrisman, commissioner, to the First National Bank of Danville, did not pass or vest any title to the land mentioned and described therein to said bank, or that the deed from said First National Bank of Danville to this defendant did not pass or vest any title to said land to her, or that both or either of said deeds are wholly nugatory and void, or that she cannot oust the plaintiff or any one else of the possession of said land on her claim of title herein.

Wherefore she prays as in answer and counter-claim, and for all proper relief.

DURHAM & JACOBS,
ANDERSON & HERNDON,
for Defendants.

Geo. Denny, president of National Bank of Lancaster, Ky., says he believes the statements of the foregoing rejoinder are true.

GEO. DENNY.

Sworn to before me by Geo. Denny, Feb. 24, 1881.
J. S. CHRISMAN, *Clerk.*

65 And on the same day, February 24, 1881, plaintiffs filed demurrer to defendants' rejoinder, which is as follows:

Boyle Circuit Court.

S. D. MILLER and others, Plaintiffs
vs.
JNO. MEYER and others, Defendants. } Demurrer.

Demurrer to Rejoinder.

The plaintiffs and defendant to counter-claim demur to the rejoinder in following particulars:

1. In so far as it denies that the $12,800 had been paid long prior to the date of the purchase by defendant, because in direct conflict with the deed from Jno. W. Miller to his creditors which is not impeached for fraud or mistake.

2. In so far as it sets up the indebtedness of $6,000 because same is amply secured, and it is not pretended that the purchase was made by defendant to secure themselves in said payment.

3. In so far as it sets up the contract with the First National Bank of Danville as regards the assignment of debts, because same is outside of the deed relied upon from said last-named bank to defendant and in conflict with its expressed consideration, because same was prohibited by law, was against pub-
66 lic policy, and is void, and because no credit is given in said $3,575\frac{21}{100}$ for $ amount paid thereon by the estate of Samuel W. Miller, as shown by the records and papers made part of defendants' pleadings.

4. In so far as same denies that defendant had no right to buy, take, or hold the said paper, and in so far as same denies the invalidity of the deed by commissioner.

Wherefore they pray their demurrer may be sustained.

W. D. HOPPER,
W. O. BRADLEY,
Attorneys.

And on the same day, to wit, the 24th day of February, 1881, plaintiffs filed their sur-rejoinder, which is in words, as follows:

Boyle Circuit Court.

S. D. MILLER, &c., Plaintiffs,
vs.
JOHN MEYER, &c., Defendants. } Sur-rejoinder.

The plaintiffs for sur-rejoinder herein say that they have no knowledge or information sufficient upon which to form a belief as to whether defendant was by the term of the agreement
67 with the First National Bank of Danville substituted to all the rights or any of the rights of said last-named bank, in

and to her proportion of said $3,575\frac{21}{100}$, because no such agreement is exhibited herein and none such appears in the deed between the banks.

They deny that the distribution of $6,000, as named, had anything to do with the transaction now complained of because they say the same is amply and fully secured to defendant by plaintiff, Jno. W. Miller, and was at the date of the attempted trade between the bank, and there was no necessity for any purchase with a view of saving the debt aforesaid, and said Miller has paid one payment of $1,500 on said $6,000 indebtedness. They state that defendant was not a party to the suit to settle the trust estate of S. W. Miller, and filed no claim against same, and was not a creditor of said Jno. W. Miller.

Wherefore plaintiffs pray for all proper relief.

HOPPER & BRADLEY,
For Plaintiffs.

68 And afterwards, on the 25th day of February, 1881, the defendant, the National Bank of Lancaster, filed rebutter, which is in words as follows:

Boyle Circuit Court.

S. D. MILLER AND OTHERS
vs.
JNO. MEYER AND OTHERS. } Rebutter.

The defendant, the National Bank of Lancaster, denies that, under the agreement between said bank, she can present the $3,575.20 debt against said Jno. W. Miller's estate only to the extent of the balance due on same after crediting thereon the sum of $3,053.90, or whatever the amount paid thereon by S. W. Miller's estate, on or (about) the 15th day of September, 1880. She alleges that the agreement between said bank and the transfers to her are filed herewith and made part hereof; and she denies that the construction attempted by plaintiffs and negative above is the true one. On the contrary, the true intent, spirit, and meaning thereof is to give to defendant

69 the benefit of a *pro rata* on the whole $3,575.26 debt against Jno. W. Miller's estate, to the extent that it may be necessary to pay the balance due thereon, after exhausting the estate of S. W. Miller. Such was the contract between said banks and the purpose of the parties, and it is so understood by the First National Bank of Danville. She denies that she ever contracted to present against the estate of Jno. W. Miller the balance of the $3,575.26, after crediting the *pro rata* received from S. W. Miller, and out of that dividend to then pay the First National Bank of Danville an amount equal to the amount

that the latter bank would have received on their two debts of $2,500 each (subject to credit of $421.03, paid 7th day of August, 1878, and $500 paid 23d day of September, 1878,) against Jno. W. and S. W. Miller, provided said $3,575.26 debt had not been proven against Jno. W. Miller's estate; but, on the contrary, she contracted, as she had the right to do in the adjustment of the business transactions between said banks, to pay the First National Bank of Danville out of the dividend she might
70 realize on the whole $3,575.26 debt from John W. Miller's estate, an amount equal to what said First National Bank would have realized out of John W. Miller's estate had not the $3,575.26 been presented. Such was the intent and purpose of the parties; and if by any possibility the language used in said contract, dated 23d September, 1880, could or should be distorted to mean anything else, she asks that it be reformed and made to conform to the agreement between them, as she herein alleges. She denies that the amount defendant bound herself to pay said First National Bank far exceeds the *pro rata* she will obtain on the alleged balance of said $3,575.26 debt, or that instead of obtaining anything more out of Jno. W. Miller's estate by reason of her agreement, will absolutely obtain less, and in the end will be loser thereby. She has hitherto and herein filed said agreements.

The said demand of $3,575.26 with accrued interest was duly proven and presented, and filed with Jas. A. Beazley,
71 the trustee of John W. Miller, by the said First National Bank of Danville, prior to the agreement between this defendant and said bank, and the transfers to her by the latter as aforesaid, and said Beazley had same in his possession, including the written obligation of said Miller to pay same, and said Beazley had deposited all of same for safe-keeping with his attorney, G. W. Dunlap, but the same has, since defendant became the transfer and owner thereof, been lost, mislaid, or has in some manner disappeared without the fault or fraud of said Beazley, Dunlap, or this defendant, and same cannot be found and produced, although diligent search has been made therefor; said obligation to pay said debt was dated — day of —, 187—, and was duly proven and filed as aforesaid with said trustee, but they deny that it was presented to him and the first agreement aforesaid concealed from him to fraudulently collect more upon it than she was entitled in reality to collect, or that it was
72 concealed at all. She denies that her agreement with First National Bank in regard to the non-crediting on the $2,500, the amount she was to pay said bank out of her own dividend, was fraudulent, or made to or did or will defraud the creditors of S. W. Miller, or was made to enable said bank to receive more than its debt against S. W. Miller, (thus to defraud

his creditors,) as to what steps said First National Bank has taken in the State of Missouri to subject S. W. Miller's land to the payment of the balance due thereon, defendant does not know, nor has she sufficient knowledge in regard thereto to form a belief. It is true she did, in the adjustment of the matters between said banks, also purchase from the First National Bank the balance of the $5,557.75 debt referred to by plaintiffs, but they deny that it was done to give a colorable show of fairness and honesty to said transaction, or that said purchase was pretended, or that it was done merely as a cloak to cover
73 up any alleged fraudulent intent and purpose; she denies any and all alleged or imputed fraud; denies that she, in order to speculate in the said land, thus bound herself, or that their object at last was to realize a profit on the land transaction, and that this was her only object. She never would have had any transaction with the First National Bank in regard to said land, but for the purpose and with the intent of saving herself from loss, as hereinbefore alleged. She denies that said agreements, assignments, and transfers, are or were pretended, or are void and against public policy, and or are prohibited by the charter of said banks and the laws under which they are organized. She denies that she was not induced to buy the said land by reason of said agreement or any of them. Said agreements are, (as before stated, exhibited, filed and, made part hereof,) marked respectively "A," "B," "C."

She alleges that said debts held by the First National
74 Bank against S. W. Miller and Jno. W. Miller were just and valid debts against the trust estate of S. W. Miller, and also against the estate surrendered by Jno. W. Miller to Jas. A. Beazley for the benefit of his creditors, and were entitled to a dividend or *pro rata* from both estates upon the full amount of the debts until the indebtedness was fully discharged; neither of said estates being sufficient to pay the indebtedness respectively in full, but requiring a *pro rata* from both estates on the full amount of the indebtedness to pay the same in full.

Wherefore they pray as heretofore, and for all proper relief.

DURHAM & JACOBS,
and ANDERSON & HERNDON,
For Defendant.

Geo. Denny, President of National Bank of Lancaster, *are true* to the best of his knowledge and belief.

GEO. DENNY.

Sworn to before me by Geo. Denny this 25th February, 1881.
J. S. CHRISMAN, *Clk.*

75 And on the same day, the 25th of February, 1881, plaintiffs filed their sur-rebutter, which is in words as follows:

Boyle Circuit Court.

S. D. MILLLER, &c., Plaintiffs,
vs.
JOHN MEYER, &c., Defendants. } Sur-rebutter.

Not waiving their demurrer herein, but insisting on same, plaintiffs on original, and defendant on counter-claim for su-rrebutter, herein deny that the true intent, spirit, and meaning of the contracts set out is to give to defendant the benefit of a *pro rata* on the whole $3,575.26 debt against Jno. W. Miller's estate to the extent that it may be necessary to pay the balance due thereon, after exhausting the estate of S. W. Miller, deny that such was the contract between said banks and the purpose of the parties, and deny it is so understood by the First National Bank of Danville.

They deny that defendant contracted, as she had the right to do, in the adjustment of the matter in business transactions between said banks, to pay the First National Bank of Dan-

76 ville, out of the dividend she might receive on the whole $3,575.26 debt from Jno. W. Miller's estate, an amount equal to what said First National Bank would have realized out of John W. Miller's estate had not the $3,575.26 been presented, and deny that such was the intent and purpose of the parties; deny that defendants have any right to have said agreement of 23d September, 1880, reformed in any way as to whether said Beazley (who plaintiffs deny ever was Jno. W. Miller's trustee) ever deposited the paper mentioned with his attorney, G. W. Dunlap, for safe-keeping; the plaintiffs do not know, nor have they any information in regard thereto sufficient on which to form a belief; neither have they any *knowledge* or information sufficient upon which to form a belief as to whether said papers or either of them have ever been lost, mislaid, or have in some manner disappeared without the fault or fraud of said Beazley, Dunlap, or de-

77 fendant, or in any other way. They state that said Jno. W. Miller did not sign the said note for $3,575.26 either as security or principal; nor did his name appear thereto, but that long after same was executed by his father, Thomas Anderson and R. H. Bettis, said Thos. Anderson and Miller (S. W.) having long before that time obtained the consideration therefor on the faith of said paper, the plaintiff, Jno. W. Miller, having never received a single cent of said consideration, the said First National Bank released said R. H. Bettis in order to induce him to execute a deed of trust, which he did, and said Jno. W. Miller agreed in such event to take his place in said note, and executed an

agreement binding himself so to do. So it is the plaintiffs aver that said Jno. W. Miller is not now and never was bound in any way by the said paper, and the same was without any consideration, and is null and void, and cannot be enforced against him or his estate. They deny that defendant never would have had any transactions with the said First National Bank in regard
78 to said land, but for the purpose and with the intent of saving himself from loss as alleged.

They deny that said debt for $3,575.26 was just and valid against said Jno. Miller, or his estate, because of the matter already hereinbefore alleged, and were entitled to a dividend from both estates.

And now having made response the plaintiffs pray as heretofore, and for all proper relief.

W. D. HOPPER,
W. O. BRADLEY,
Attorneys.

Boyle Circuit Court.

Jno. W. Miller says he believes the statements of the foregoing sur-rebutter are true.

JOHN W. MILLER.

Sworn to before me by Jno. W. Miller this 25th February, 1881.

J. S. CHRISMAN, *Clerk.*

And, also, on the same day, the 25th February, 1881, plaintiffs filed an amended sur-rejoinder which is as follows, to wit:

Boyle Circuit Court.

79 S. D. MILLER, &c., plaintiffs,
vs.
JOHN MEYER, &c., defendants.
} Amended Sur-rejoinder.

The plaintiffs on petition, and defendant on counter-claim, for amended sur-rejoinder herein, not waiving their demurrer, but insisting on same, deny that the $6,000 mentioned has any connection with the transaction between defendant and the First National Bank of Danville, or formed any reason for the purchase by the former from the latter bank, or that said purchase was made with the view or for the purpose of saving said $6,000 or any part of it; on the contrary, they allege that prior to that time, to wit, on the 21st day of July, 1880, said John W. Miller paid them on said $6,000 the first payment of $1,500; with accumulated interest, and the property itself, and the securities therefor, were greatly more than sufficient to pay the whole amount thereof, much less the balance to become due on it.

80 They deny that defendant was by the terms of the agreement with the First National Bank of Danville substituted to all the rights or any of the rights of said last-named bank in and to her proportion of the trust fund in said $3,575.26, which lessened defendant's loss on her original demands of $12,800 against the trust fund to the extent of the *pro rata* of said First National on her said debt of $3,575.26. The plaintiffs charge that under the pretended agreement between said Bank the defendant can present the $3,575.26 debt against said John W. Miller's estate only to the extent of balance due on same after crediting thereon the sum of $3,053.90, paid thereon by S. W. Miller's estate, on the 15th day of September, 1880, and then out of the *pro rata* received from John W. Miller's estate on said balance the said defendant is to pay the said First National Bank of Danville an amount equal to the amount that the said last named bank would have received on their two debts
81 of $2,500 each, (subject to credit of $421.03 paid 7th day of August, 1878, and $500 paid 23d day of September, 1878,) against John W. Miller and S. W. Miller, provided said $3,575.26 debt had not been proven against John W. Miller's estate, and this was to be paid said First National Bank of Danville in addition to the amount she is entitled to receive of John W. Miller's estate. The object of said pretended contract being to give said First National Bank the amount she would receive if John W. Miller's estate were divided after excluding said $3,575.26 debt, so it is the plaintiffs aver that the amount that defendant bound herself to pay said First National Bank will far exceed the pro rata she will obtain on the balance of said $3,575.26 debt; and the defendant, instead of obtaining anything more out of John W. Miller's estate by reason of said agreement, will absolutely obtain less, and in the end will be loser thereby. They state that the said $3,575.26 debt men-
82 tioned in the rejoinder is the same mentioned in the pretended agreement between the banks as $3,575.50. They state that said defendant and First National Bank have an agreement aside from that stated, which appears to be a simple assignment of said $3.575.26 debt, and that the object was and is upon the part of defendant to present the whole $3,575.26 against John W. Miller's estate, (and they (defendants) have so presented the same to said Beazley and concealed from him the said first agreement,) and thus fraudulently to collect more upon it than she was entitled in reality to collect, without any regard to the credit on same realized out of S. W. Miller's estate; and not only so, it was agreed in the first pretended contract that the payments so made by the defendant, when made, were not to be credited on said $2,500 debt aforesaid, nor in any way to inure to the benefit of S. W. Miller; the intention being to enable said First National

Bank to receive even more than its debt against S. W.
83 Miller, (and thus to defraud his creditors,) they (said First National Bank) having proceeded in the State of Missouri to subject the land of said S. W. Miller in that State to the payment of the balance due them on their debt as found by the reports of the trustee in said suit of said Trustee *vs.* S. W. Miller, and to settle his estate without giving any credit for the amount paid by defendant or to be paid under the said agreement. They further charge that the said Bank of Lancaster, in order to give a colorable show of fairness and honesty to said transactions in a third agreement with said First National Bank of Danville, pretended to purchase from said last-named bank their claim against S. W. Miller, and took a pretended assignment of same (and in which said John W. Miller was in nowise bound and had no interest) for $5,551.75 to said defendant, while at the same time the said First National Bank of Danville had at that time realized in every cent that could be realized on said claim; and this
84 was done merely as a cloak to cover up the fraudulent intent and purposes aforesaid.

They charge that said defendant in order to speculate in the said land thus bound themselves, and that their object at last was to realize a profit in the land transaction, and this was their only object. They charge that all such pretended agreements, assignments, and transfers are void and against public policy, and are prohibited by the charter of said *banks* and the laws under which they are organized. They charge that defendant was not induced to buy the said land by reason of said agreements, or any one of them. They state that said debt of $5,551.75 is an entirely different debt to the two $2,500 debts aforesaid and the said $3,575.26. They ask to present this amended sur-rejoinder because they did not and could not obtain the said agreement in order to answer fully until after the said sur-rejoinder was
85 filed, and did not have any knowledge or reliable information in regard thereto until this day.

Wherefore plaintiff prays for all proper relief, and for relief heretofore specially asked.

W. D. HOPPER,
W. O. BRADLEY,
Attorneys.

Jno. W. Miller says the statements of the foregoing amended sur-rejoinder are true, this February 25th, 1881.

JNO. W. MILLER.

Subscribed and sworn to before me by Jno. W. Miller, this February 25th, 1881.

J. S. CHRISMAN, *Clerk.*

And, also, on the same day, the 25th February, 1881, the defendant filed demurrer to plaintiff's sur-rejoinder and amended sur-rejoinder, which is as follows:

Boyle Circuit Court.

S. D. MILLER and others, Plaintiffs,
vs.
JOHN MEYER and others.

Demurrer to Sur-rejoinder and Amended Sur-rejoinder.

The defendant, the National Bank of Lancaster, Ky., demurs to the sur-rejoinder and amended sur-rejoinder herein:

1st. Because the allegations in regard to the $6,000 mentioned therein are irrelevant, and have no application to
86 this controversy.

2d. Because the allegations and statements do not state facts sufficient to constitute a cause of action or to support a defense. Wherefore, &c.

DURHAM & JACOBS,
ANDERSON & HERNDON,
for Defendants.

And, also, on the same day, the 25th February, 1881, the plaintiffs filed their demurrer to defendant's rebutters, which is as follows:

Boyle Circuit Court.

S. D. MILLER, &c., Plaintiff,
vs.
JOHN MEYER &c., Defendants.

Demurrer to rebutter.

The plaintiffs and defendant, on counter-claim for demurrer herein, say: The rebutter is insufficient and not good in law or equity, in so far as same sets up a meaning, intent, and spirit of the transfers and agreements, or any one of them, different from that expressed therein, or in so far as it seeks a reform-
87 ation thereof, or in so far as it sets up a construction of same different to the said paper therein filed and exhibited in so far as it sets forth an agreement by Jno. W. Miller to pay said $3,575.26 debt, or that the same is just in so far as it sets up that Beazley is Miller's trustee in so far as it sets up the right of either of said banks to have the transactions aforesaid.

Wherefore, to the extent mentioned, they ask that their demurrer may be sustained.

W. D. HOPPER,
W. O. BRADLEY,
Attorneys.

And afterwards, on the 4th of March, 1881, the defendant filed additional pleading, which is in words, as follows:

Boyle Circuit Court.

S. W. MILLER, &c., Plaintiffs,
vs.
JOHN MEYER, &c., Defendants.

Additional Pleadings of Defendant.

The defendant, the National Bank of Lancaster, denies that John W. Miller never received any part or a single cent of the consideration of the $3,575.26 debt; deny that the
88 First National Bank of Danville released R. H. Bettis in said debt in order to induce him to execute a deed of trust, but, on the contrary, plaintiff, Jno. W. Miller, and the said S. W. Miller, procured the release of Bettis themselves, in order to induce Bettis to execute the deed of trust, which he did execute accordingly, and said Jno. W. Miller did execute the obligation to the First National Bank of Danville, taking Bettis' place on the $3,575.26, and bound himself therein; and she alleges that said release of Bettis never would have been made but for the procurement of said S. W. and Jno. W. Miller, and the execution of the obligation aforesaid by Jno. W. Miller to said bank; and she denies that he, John W. Miller, was never bound in any way by said paper, or that the same was without consideration, or that it is null and void, and that it cannot be enforced against him or his estate, or that said debt was
89 never entitled to a dividend from both of the estates of S. W. and John W. Miller.

Wherefore she prays as herein, in former pleadings, for all proper relief.

DURHAM & JACOBS,
ANDERSON & HERNDON,
For National Bank.

Exhibit "A."

Exhibit "A," filed on the 25th of February, 1881, and referred to in defendant's pleadings is in words and figures as follows, to wit: In adjusting matters between the National Bank of Lancaster and the First National Bank of Danville, in addition to other

matters, it is understood that the debt for $3,575.26, held by the First National Bank of Danville *vs.* S. W. Miller and others, dated November 23, 1877, and due six months after date, is to be transferred without recourse to the National Bank of Lancaster, who is to be entitled to any *pro rata* on said debt that may be coming out of the estate of John W. Miller after crediting the *pro rata* which may be received on same out of the estate of S. W. Miller. But it is further understood that said George Denny is to pay the First National Bank of Danville out of the money received
90 from John W. Miller's estate on said $3,575.56 debt an amount equal to the amount that said bank would have received on their two debts of $2,500 each against John W. Miller and S. W. Miller, provided said $3,575.56 debt had not been proven against John W. Miller's estate. This is to be paid said First National Bank in addition to the amount she will be entitled to receive from John W. Miller's estate, the object being to give said First National the amount she would receive if John W. Miller's estate were divided after excluding said $3,575.56 debt.

The amount to be paid by George Denny is not to be credited on the $2,500 debts, or either of them, nor in any way inure to S. W. Miller's benefit, one of the $2,500 debts above mentioned, is credited by $421.03, paid August 7, 1878, and by $500, paid September 23, 1878.

September 23, 1880.

NATIONAL BANK OF L., KY.
GEORGE DENNY, *President.*
J. A. QUISENBERRY,
Cashier of First National Bank of Danville.

91 *Exhibit "B."*

Exhibit "B," filed on the same day, the 25th of February, 1881, and referred to in defendants' pleadings, is in words and figures as follows, to wit:

In the adjustment of business matters between the National Bank of Lancaster, Ky., and the First National Bank of Danville, Ky., the debt for $3,575.56 and securities therefor, held by the latter against S. W. Miller and others, the note therefor, dated November 23, 1877, due six months after date with eight per cent. per annum interest after maturity, is hereby transferred without recourse to George Denny, senior, president, and he is to be entitled to any *pro rata* on said debt, payable out of the trust estate of John W. Miller, according to the terms of agreement between him and the First National Bank of Danville, of date 23d September, 1880.

This 25th day of September, 1880.

FIRST NATIONAL BANK OF DANVILLE,
By J. A. QUISENBERRY, *Cashier.*

James S. Chrisman, commissioner, hereby aliens and conveys to the First National Bank of Danville all the right, title, and interest the said S. W. Miller and M. J. Durham, his trustee, has in and to said lands so sold as aforesaid. Said lands are in Boyle and Garrard counties, State of Kentucky, on the waters of Dix river, and bounded as follows, viz: Beginning at the southeast corner of the tract, and in the middle of the Danville and
97 Lancaster turnpike road and corner 12 *arc*, thence with 12 *arc* and Hampton's lines N. 37 W. 144 poles to the middle of the bed of Dix river, thence with same N. 73 E. 28 poles, thence N. 60 E. 32 poles, thence N. 30 E. 24 poles, thence N. 5 W. 56 poles, thence N. 7 E. 40 poles, thence N. 35 E. 20 poles, thence across the river at the ford N. 7 W. 28 poles to a sugar-tree stump, on the margin of the creek below the old mill, thence N. 66 E. 115 poles, thence E. 32 poles to a sugar tree, thence S. 63 E. $84\frac{80}{100}$ poles to the margin of Boon creek, thence down the same to Dix river at high-water mark, thence with the meanders of said river at high water around to a point across the river near the iron bridge, thence N. 40 W. $9\frac{20}{100}$ poles to a sycamore tree, thence with the line of the Danville and Lancaster turnpike road S. 68 W. 84 poles, thence with the middle of same S. 59 W. $65\frac{60}{100}$ poles to the beginning, containing five hundred and eight acres, two roods, and thirty-one poles, be the same more or less, and its appurtenances. There is reserved to S. W.
98 Miller the right to get water from a spring on said land near the still-house—to run said distillery but for no other purpose. And the undersigned, as commissioner aforesaid, on behalf of S. W. Miller and M. J. Durham, his trustee, will warrant and defend the title to said land unto the said bank against the claims of all persons claiming by or through the said Miller and Durham, as his trustee, and he hereby makes such other warrantee of said lands to said bank as the law authorizes.

Witness my hand, as commissioner aforesaid, this September 25th, 1880.

J. S. CHRISMAN,
Special Commissioner.

Commissioner's Deed Approved by Court.

BOYLE CIRCUIT COURT, *Set.*

I, J. S. Chrisman, clerk of Boyle circuit court, hereby certify that this deed from S. W. Miller, by J. S. Chrisman, special commissioner of said court, to First National Bank of Danville, was on the 25th day of September, 1880, presented in open court by said Chrisman, and was by him duly acknowledged to be
99 his act and deed, and the said deed having been examined by the court, was approved and confirmed, and so endorsed

by the judge and ordered to be transmitted duly certified to the clerk of the Boyle county court for record, which is now done.

Given under my hand, as clerk of said court, this, 28th of September, 1880.

J. S. CHRISMAN, *Clerk.*

Certificate of County Clerk.

STATE OF KENTUCKY, } *Sct.*
County of Boyle, }

I, Reed S. Nichols, clerk Boyle county court, do certify that the foregoing deed from S. W. Miller, and by commissioner, to First National Bank of Danville, was this day filed in my office, with the certificate thereon endorsed, and ordered to be recorded, which is now done.

Given under my hand, this, 29th September, 1880.

Attest: REED S. NICHOLS, *Clerk.*

Order of Board passed September 21, 1880.

Said order is in words and figures as follows:

Order of Board passed September 21st, 1880: Upon
100 motion of John J. Craig, seconded by J. W. Harlan, the board appointed a committee consisting of M. J. Farris, Samuel Harding, J. A. Quisenberry, and J. H. Cheek, to meet the committee from the National Bank of Lancaster, with full [power] and authority from this bank to act for it in any matter growing out of the purchase of the S. W. Miller land by this bank.

And afterwards, on the 28th of September, 1880, a second meeting of the board was held, and the orders at said meeting is in words and figures as follows:

Second Order of Board of First National Bank of Danville.

Order of Board and Report of Committee at Meeting September 28th, 1880.

The committee appointed at the meeting of the board held September 21, 1880, for the purpose of conferring with the committee from the National Bank of Lancaster, concerning matters growing out of the S. W. Miller matter, reported that they
101 had agreed with the Lancaster committee to transfer to the National Bank of Lancaster the purchase of the S. W. Miller farm, made August 7th, 1880, by this bank, upon the payment by said bank, of the two debts ($6,241 and 6,242) of this bank against Thomas Anderson, S. W. Miller, and others, prin-

cipal, accrued interest, and all costs incurred in obtaining judgment on said debts, less five hundred dollars, with a supplementary agreement concerning debt $6,242, for further particulars concerning which reference is herewith made to the original agreement presented by the committee along with this report, which is now held by this bank. Upon motion of John J. Craig, seconded by R. L. Salter, the report of the committee was accepted by the board, and it was further ordered in said motion, that M. J. Farris, president, be authorized to sign a transfer of the judgment obtained on these two notes above referred to without recourse on this bank, and to sign the corporate name
102 of this bank, and attach thereto its seal to two deeds which were produced and approved by the board, one transferring to S. W. Miller 22 acres, more or less, of Clifland, as per agreement with him, and the other deed transferring to the National Bank of Lancaster, the balance of the S. W. Miller farm as purchased at the sale made by M. J. Durham, trustee, on August 7th, 1880, these two deeds, representing the entire amount of land transferred to this bank by J. S. Chrisman, commissioner of the Boyle circuit court, on behalf of S. W. Miller, and M. J. Durham, trustee, by deed dated September 25, 1880, it being distinctly understood that this bank undertake to transfer by said deed to S. W. Miller and the National Bank of Lancaster, only such title as the deed of J. S. Chrisman, commissioner, &c., aforesaid, vested in this bank.

And afterwards, on the 30th day of September, 1880, a deed was made from the First National Bank of Danville to
103 National Bank of Lancaster, which deed is in words and figures as follows:

Deed from First National Bank of Danville to National Bank of Lancaster.

This indenture, made this 28th day of September, 1880, between the First National Bank of Danville, a banking corporation, whose place of busines is in Boyle county, Kentucky, of the first part, and the National Bank of Lancaster, a banking corporation, whose place of business is in Garrard county, Kentucky, of the second part, witnesseth:

That for and in consideration of the sum of thirteen thousand nine hundred and forty-five $\frac{59}{100}$ dollars cash in hand paid, the receipt, of which is hereby acknowledged, the party the first part has this day, and doth by these presents, bargain, sell, alien, convey, and deliver to the party of the second part and her assigns the following tract or parcel of land lying in Boyle and Garrard counties on the waters of Dix river, and bounded as follows, viz:

Beginning at the southeast corner of the tract and in
104 the middle of the Danville and Lancaster turnpike road and corner to a 12 acre tract, thence with 12 acre and Hampton's lines N. 37 W. 144 poles to the middle of the bed of Dix river, thence with same N. 73 E. 28 poles, thence N. 60 E. 32 poles, then N. 30 E. 24 poles, thence N. 5 W. 56 poles, thence N. 7 E. 40 poles, thence N. 35 E. 20 poles, thence across the river at the ford N. 7 W. 28 poles to a sugar tree stump, on the margin of the creek below the old mill, thence N. 66 E. 115 poles, thence east 32 to a sugar tree, thence S. 63 E. $84\frac{80}{100}$ poles to the margin of Boon's creek, thence down the same to Dix river at high water mark, thence with the meanders of said river at high water around to a point across the river near the iron bridge, thence N. 40 W. $9\frac{20}{100}$ poles to a sycamore tree, thence with the line of the middle of the Danville and Lancaster Turnpike road S. 68 W. 84 poles, thence with middle of same S. 59 W. $65\frac{60}{100}$ poles to the beginning, containing
105 five hundred and eight acres, two roods, and thirty-one poles, be the same more or less, and its appurtenances, but out of the above-named boundary there is expressly reserved, excepted, and not conveyed to the second party the following tract or parcel of land lying and being in Garrard county, Kentucky, and bounded as follows, to wit: beginning at the ford of Dix river near the dwelling house, and at high water mark on the Garrard county side, thence N. 7 W. $18\frac{30}{100}$ poles to a small creek towards an old mill, thence leaving the creek N. 66 E. 115 poles, thence east 32 poles to a sugar tree, then S. 63 E. $84\frac{80}{100}$ poles to a sugar tree on the east side of Boon's creek to Dix river at high water mark, thence with the meanderings of Dix river at high water mark to the beginning, containing about twenty-two acres, be the same more or less, and being all the land on the Garrard county side of Dix river, which is embraced in the large
106 boundary hereinbefore given. There is reserved to S. W. Miller the right to get water from a spring on the first named tract, near the still house, to run said distillery, but for no other purpose, and the said party of the first part will warrant and defend the title to the said tract of land, except the 22 acres and the spring, unto the said party of the second part against the claims of all persons claiming by, through, or under her, and invest said second party with all the right, interest, and title with which the first party hereto was *invested* by deed of J. S. Chrisman, commissioner on behalf of S. W. Miller and M. J. Durham, his trustee, to the first party herto, dated September 25, 1880.

In testimony of all which, witness the signature of said bank, by M. J. Farris, President of the First National Bank of Danville, and the seal of said bank, subscribed and affixed
107 by order of the Board of Directors of said bank, made and

entered upon their minute book this the day and date first above written.

THE FIRST NATIONAL BANK OF DANVILLE,
[SEAL.] By M. J. FARRIS, *President.*

STATE OF KENTUCKY, } *Set.:*
COUNTY OF BOYLE, }

I, Reed S. Nichols, clerk Boyle county court, do certify that the foregoing deed was this day acknowledged before me by the First National Bank of Danville, by M. J. Farris, President, to be the act and deed of said bank, and ordered to be recorded, which is now done.

Given under my hand, this 30th day of September, 1880.

REED S. NICHOLS, *Cl'k.*

Be it remembered, that on the 24th day of March, 1881, the original paper, together with transcript of all the orders, &c., from the Boyle circuit court, was filed in this office.

On which the following endorsement:

1881, March 24.—Received by the hands of the Boyle circuit clerk, and filed.

Att.: J. P. BAILEY, *Cl'k.*

108 And at the same term and on the 15th day of April, the following judgment was rendered, to wit:

Judgment at March Term, 1881.

S. D. MILLER and others, Plaintiffs,
vs.
JOHN MEYER, (The National Bank of Lancaster,) Defendants. } Judgment.

This action was this day submitted to the court for its judgment on demurrers, exceptions to depositions, and contracts, motions herein and on the merits, and heard upon the pleadings, depositions, affidavits, and exhibits on file, including the deed from J. S. Chrisman, commissioner, to the First National Bank of Danville, and the deed from First National Bank of Danville to the National Bank of Lancaster, which deeds were produced and filed by defendant, National Bank of Lancaster, as evidenced in the action before the hearing, and are indorsed filed by the clerk, and now noted of record, and the court being sufficiently advised, renders the following opinion and judgment herein:

In the opinion of the court, the conveyance made by the
109 First National Bank of Danville to the National Bank of Lancaster for the land in controversy is not void, and that plaintiffs and defendants to counter-claim of defendant National Bank of Lancaster have no right, title, or interest in said land in controversy, and therefore no right to question the validity of said deed; the United States through its proper officers alone having the right to enforce a forfeiture, and this deed is not void on its face, and it is therefore adjudged by the court that the defendant National Bank of Lancaster is entitled to the relief sought in its counter-claim, and that said bank recover of defendants to its counter-claim, to wit, S. D. Miller, E. B. Miller, and John W. Miller and Susan Miller, the tract of land in its counter-claim described, and which is described as follows, situated in Boyle county: Beginning at the middle of the Danville and Lancaster turnpike and corner to Case and running thence with said Case's and Hampton's line N. 37 W. 144 poles to the
110 middle of the bed of Dix river; thence with same N. 73 E. 28 poles; thence N. 60 E. 32 poles; thence N. 30 E. 24 poles; thence N. 5 W. 50 poles; thence N. 7 E. 40 poles; thence N. 35 E. 20 poles; thence with the meanders of said river at high-water mark, and including said river up and around the same to a point near the iron bridge; thence crossing the river N. 40 W. $9\frac{20}{100}$ poles to sycamore tree; thence with the line of the middle of said turnpike road S. 68 W. 84 poles; thence with middle of same S. 59 W. $65\frac{60}{100}$ poles to the beginning, and containing four hundred and eighty-six acres two roods and thirty-one poles. It is adjudged that said National Bank of Lancaster is entitled to a writ of possession for said tract of land above described against said defendants to its counter-claim, and the clerk of this court upon application of said bank is directed on or after the first day of May, 1881, to issue said writ directed to the sheriff of Boyle county.

111 The court being of opinion that the writ of possession issued by the clerk of the Boyle circuit court against plaintiffs S. D. Miller and E. B. Miller and in the petition mentioned being irregular, it is therefore quashed, and the injunction against said writ is perpetuated, it being adjudged that plaintiffs are entitled to the relief asked to that extent, and the writ of possession herein awarded to the National Bank of Lancaster is the only writ of possession it shall be entitled to have issued.

The plaintiffs having been given relief to the extent above adjudged, it is adjudged that plaintiffs recover of the National Bank of Lancaster their costs expended herein. It is adjudged that the demurrers of the plaintiffs and Susan Miller to any and all of the pleadings of the National Bank of Lancaster be and same are overruled, to which ruling plaintiffs and Susan Miller except.

The plaintiffs and Susan Miller moved the court for its judgment on the exceptions filed by them, to various portions of the
112 testimony in depositions on file, contracts, affidavits, and deeds, and read by defendant National Bank of Lancaster on the trial; but the court being of opinion that said plaintiffs and Susan Miller not having any right, title, or interest in said land, a decision as to the competency or incompetency of any portion or portions of the testimony excepted to is not material to the said parties, and therefore decline to pass upon said exceptions, to which said plaintiffs and Susan Miller except. To this judgment the plaintiffs and Susan Miller except and pray an appeal to the court of appeals, which is granted. Leave is given the National Bank of Lancaster, Ky., to withdraw Exhibits "A," "B," "C," "E," "H" by leaving certified copies thereof in the record. The plaintiffs and Susan Miller filed their bill of exceptions, which is signed, sealed, &c., and ordered to be copied into any transcript hereafter made of this case without being spread at large
113 on the record.

Said bill of exceptions, so filed, is as follows:

Lincoln Circuit Court.

S. D. MILLER, &c., Plaintiffs,
vs.
JOHN MEYER, &c., Defendants.

THE NATIONAL BANK LANCASTER, Plaintiff,
vs.
S. D. MILLER, &c., Defendants.

Bill of exceptions.

Be it remembered, that on the calling of this case the plaintiffs, on original petitions and defendants on counter-claim, filed exceptions to the contracts A, B, C, E, H, the depositions of Geo. Denny, J. A. Cheek, and A. R. Denny, and the affidavit of M. J. Farris and J. A. Quisenberry.

It was agreed before the hearing of the case by all the parties that the paper styled "Additional pleadings filed herein, March 4, 1881," be traversed of record by the said S. D. Miller, &c., and that all the pleadings of said S. D. Miller, J. W. Miller, and E. B. Miller be adopted and used by Susan Miller as her de-
114 fense herein, and all the pleadings of the National Bank Lancaster, and in response to that of said Miller other than Susan Miller be taken as their pleadings against her.

Thereupon the cause came on, and when the affidavits of M. J. Farris and J. A. Quisenberry, the said contracts, deeds, and depositions were offered to be read, the said S. D. Miller, &c., objected thereto upon the grounds set out in exceptions filed as aforesaid, and exceptions indorsed in the body of said deposi-

tions; but the court overruled the objections, and suffered all said papers used on the trial, to which ruling of the court the said S. D. Miller, &c., at the time excepted. Exceptions to the affidavits aforesaid were waived in so far as the form thereof was concerned, the exceptions only going to the competency and relevancy of the matter contained therein. In addition to the evidence *specifically* set forth herein, no other evidence heard, and (nothing else took place) save and except the reading
115 of the various exhibits set forth in the pleadings, together with the pleadings themselves, to wit:

A copy of the record in the case of M. J. Durham as trustee of S. W. Miller *vs.* S. W. Miller, &c.; a copy of writ of possession; copy of deed and agreement between Jno. W. Miller and his creditors, marked "O." In making out the record in the case the clerk will copy all of said pleadings, exhibits, and proof in their regular error and appropriate places, and thereupon the court rendered judgment herein, (here copy,) to which judgment the said plaintiffs on original petition and defendants on counter-claim at the time excepted, and now except and pray an appeal to the court of appeals, which is granted. This bill of exceptions is signed and sealed as the manner is, and will be copied by the clerk of this court into any transcript of the record which may hereafter be made for the court of appeals without being spread at large on the records.

116 Exhibits referred — M. H. Owsley, judge — to in the foregoing are copied in this record. Clerk.

1881, April 15, plaintiffs filed exceptions to the proof.

Lincoln Circuit Court.

S. D. MILLER, &c., Plaintiffs,
vs.
JOHN MEYER, &c., Defendants,

and

THE NATIONAL BANK OF LANCASTER, Plaintiff,
vs.
S. D. MILLER, &c., Defendants.

Exceptions to Proof, &c.

The plaintiff, on original petition, and defendants, on counter-claim, except to the reading of the copy of orders the board of First National Bank of Danville, marked "X Y," referred to in affidavit of M. J. Farris and J. A. Quisenberry; also the affidavit of and the contracts marked "E and H," dated March 10, 1881, and contracts "A," "B," and "C," because same are incompetent and illegal evidence on the issue presented by the

pleadings. They except to the depositions of George
117 Denny regarding the $11,000 debt, what took place at the sale, and his statements of the object and intention of his bank and his agreement based thereon.

They except to his statements as to contents of record and papers.

They except to the questions asked him and answered, as to intentions of bank and other persons as to how the transactions would benefit his bank; as to his statements regarding attempts to sell and pretended sale of the land in contest, or any part of it; as to his statement that he was *ever* in possession of the premises, or action taken by his bank or the officers of his bank. All of said statements are incompetent, irrelevant, at variance with the pleadings. They except to said deposition on the written grounds filed in the body thereof, here insisting on the same.

To the deposition of A. R. Denny, in so far as same is specially excepted to in the body thereof, and to the whole of same regarding what took place at the meeting of the board or officers
118 of the bank, because incompetent.

They except to the deposition of Cheek in so far as question 6 and answer to same are concerned, because the records are the best evidence, and cannot be contradicted or explained in the absence of an allegation of fraud or mistake, and for the reason set forth in within exceptions thereto in the body of his deposition.

They except to said deposition in so far as it set forth any contract not embraced in the writing and deed exhibited.

They except to question 10 and answer, on grounds set out in the body of the deposition. To question third on re-examination of the witness Cheek, and answers thereto, because incompetent and irrelevant; and to questions 5, 6, 7, 8, on re-examination, for the same reason.

They except to the reading of the commissioner's deed from Chrisman, commissioner, to First National Bank of Danville, and the reading of the deed from said bank to the National
119 Bank of Lancaster, because incompetent testimony as to matters contained therein, there being no exceptions as to the formalities of the execution or acknowledgment thereof, or as to the manner in which they were entered as instruments of evidence.

Wherefore they pray said exceptions may be sustained.

HOPPER & BRADLEY,
Attorneys.

The plaintiffs, on petition, and defendant, on counter-claim, filed their assignment of errors in clerk's office of the Lincoln circuit court April 29, 188—, as follows:

Assignment of Errors.

Lincoln Circuit Court.

S. D. MILLER, &c., Plaintiffs, *vs.* JOHN MEYER, &c., Defendants. } Assignment of errors.

and

THE NATIONAL BANK OF LANCASTER, Plaintiff, *vs.* S. D. MILLER, &c., Defendants. } On counter-claim.

The plaintiffs, on petition, and defendants, on counter-claim, S. D. Miller, E. B. Miller, Jno. W. Miller, and Susan Miller, come and assign as errors of this court the following:

1st. The court erred in overruling the motion of the
120 plaintiffs, S. D. Miller, &c., to strike out the counter-claim against Susan Miller, and to strike her name as a party.

2d. The court erred in refusing to pass upon the exceptions to contracts, affidavits, deeds, depositions made by plaintiffs, in petition, and defendants, in counter-claim.

3d. The court erred in adjudging that the deed from First National Bank, Danville, to the National Bank of Lancaster, was not void, and that plaintiffs and defendants to counter-claim had no right, title, or interest in said land in controversy, and therefore no right to question the validity of said deed, and that the United States, through its proper officers, alone had the right to enforce a forfeiture.

4th. The court erred in adjudging that the National Bank of Lancaster was entitled to the relief sought in its counter claim.

5th. The court erred in adjudging that the National Bank of Lancaster recover of defendants on their counter-claim, the land therein described, and also set forth in the judg-
121 ment, containing 486 acres, 2 roods, and 31 poles, or any part of it.

6th. The court erred in adjudging the said National Bank of Lancaster entitled to a writ of possession for said tract of land or any part thereof, and in ordering same to issue.

7th. The court erred in overruling each and all the demurrers of the said plaintiffs and defendants on counter claim to the pleadings of the defendant on petition and plaintiff on counter claim.

8th. The court erred in refusing to render judgment making injunction perpetual as to the land described in writ of possession enjoined, and in failing to quiet the title of plaintiff in and to the whole tract.

9th. The court erred in granting the National Bank any re-

lief, and in failing to grant the plaintiffs in petition and defendants in counter claim all the relief asked, and in failing to adjudge the deed from First National Bank of Danville to National Bank Lancaster void. Wherefore the plaintiff in petition and defendants in counter claim pray a reversal and for all proper relief.

HOPPER & W. O. BRADLEY,
For Plaintiffs.

122 The following is a copy of the transcript of the orders of the Boyle circuit court in this case, and transmitted with the papers in this case to the Lincoln circuit court.

Transcript of Orders, &c., from Boyle Circuit Court.

Pleas and proceedings had in the Boyle circuit court in the case herein below referred to, viz.:

S. D. MILLER, &c.,
vs.
JOHN MEYERS, &c. } Equity.

Be it remembered that heretofore on the 11th day of January, 1881, the plaintiffs by their attorneys, filed herein their petition against said defendants, in words and figures following, to wit:

(See petition filed with exhibits referred to therein.)

And at a term of the Boyle circuit court, held on the 23d day of February, 1881, the following order was made:

"The answer and counter claim of National Bank of Lancaster filed in vacation now noted of record."

(See same filed, together with the summons issued thereon.)

123 And at same term of court, held on the 24th day of February, 1881, the following orders were made:

"The motion of plaintiff to strike out the counter claim of defendant against Susan Miller from the answer of defendant, and to strike out said Susan Miller as a party, is overruled, to which ruling of the court the plaintiffs at the time excepted. Thereupon the plaintiffs filed reply herein, which, by consent of parties, is to be taken as the answer of said Susan Miller to the said answer and counter claim. Before filing said reply the plaintiffs filed demurrer to the answer and counter claim on which court took time, said demurrer by consent to be taken as demurrer of said Susan Miller. Defendant then filed rejoinder to said reply, and the plaintiff filed motion to strike out all that part of same which is embraced in brackets, and the court took time. The plaintiffs filed demurrer to said rejoinder, which is, by consent, to be taken as demurrer to the said Susan Miller,

and court took time. Thereupon the plaintiff filed a sur-
124 rejoinder, which, by consent of the parties, is to be taken as the sur-rejoinder of the said Susan Miller. The rejoinder of defendant is to be taken as a reply to the answer aforesaid of Susan Miller."

The reply, demurrer, &c., referred to in above order, accompanied with exhibits therein, are filed, except the motion of plaintiffs to strike out, &c., embraced in brackets, which is not now on file, (either lost or misplaced).

And at same term of court, held on the 25th day of February, 1881, the following order was made:

"Attorneys for plaintiff on original petition, and defendants to counter claim, offered to file an amended sur-rejoinder, to which the attorneys for defendant objected. The court overruled said objections, and allowed said amended sur-rejoinder to be filed, to which defendant excepted.

And at same term of court, held on same day, the following order was made:

"The defendant, the National Bank of Lancaster, filed a demurrer to the rejoinder of plaintiffs."

"See same filed."

And at same term of court, held on same day, the fol-
125 lowing order was made:

The defendant, National Bank of Lancaster, filed a rebutter herein.

"See same filed accompanied with exhibits."

And at same term of court, held on same day, the following order was made, plaintiff on original petition, and defendant on counter-claim filed a demurrer and sur-rebutter to rebutter of defendants.

"See same filed."

And at same term of court, held on 26th February, 1881, the following order was made:

Ordered, that this action be set for trial on Thursday, 17th day of March.

And at the same term of court, held on the 17th day of March, 1881, the following order was made:

The affidavit of J. A. Quisenberry and M. J. Farris, with the agreement of counsel in regard to being read as deposition in the case was filed.

"See same filed."

And at same term of court, held on same day, the following order was made:

126 The additional pleadings of the National Bank of Lancaster, filed in office March 4th, 1881, now noted of record.

"See same filed."

The deposition of Geo. Denny, Sr., &c., filed on 10th of March, 1881, and of J. A. Cheek, filed on 17th March, 1881, are filed herewith.

And at same term of court, held on the 17th day of March, 1881, the following order was made:

"By consent of the parties by attorneys, the venue for the trial of this action is changed to the Lincoln circuit court, to which court the clerk of this court will transmit the original paper, together with a transcript of the order herein. And by their further consent, the trial of this action is set for the 9th day of its next term."

STATE OF KENTUCKY, } ss:
Boyle Circuit Court, }

I, J. S. Chrisman, clerk of the Boyle circuit court, do certify that the foregoing is a correct transcript of the record and proceedings had in said court in above case.

Given under my hand this 22d day of March, 1881.

J. S. CHRISMAN, *Clerk.*

127 The following is a copy of the record in the case of S. W. Miller's trustee against S. W. Miller's creditors, filed herein 25th February, 1881, and noted as exhibit, the referred to in preceding pleadings and orders.

Pleas before the Hon. M. H. Owsley, judge of the Boyle circuit court, at the court-house in Danville, Boyle county, Ky., on on the 29th day of September, 1880.

Transcript from the Boyle Circuit Court.

S. W. MILLER'S TRUSTEE }
vs. } E. P.
S. W. MILLER'S CREDITORS. }

Be it remembered that heretofore, on the 20th day of January, 1880, the plaintiff, by attorneys, filed in the clerk's office of the Boyle circuit court the following petition:

Boyle Circuit Court.

M. J. DURHAM, as Trustee of S. W. Miller, Plaintiff,
against
S. W. MILLER, JNO. J. CRAIG, THE FIRST NATIONAL BANK OF DANVILLE, W. D. SMITH, AND M. J. DURHAM, Executor of John Miller, deceased, Defendants. } Petition.

128 The plaintiff, M. J. Durham, who sues as trustee of S. W. Miller, states that on the 11th day of November, 1879, the defendant S. W. Miller, by his deed of that date, duly signed, made, acknowledged, and delivered to and accepted by plaintiff, conveyed to plaintiff all of his estate and property of every kind, real and personal (except what was exempt by law from execution for debt), in trust, to sell the personal property, and to sell and convey the real estate, to collect the proceeds, and out of the same pay the costs and fees necessarily incurred in settling said trust, including all necessary and reasonable expenses incurred in same, and the attorney's fee for drawing the deed of trust, and a reasonable compensation to the trustee for his services. Then to pay the debts having valid liens on the property by mortgage, execution, attachment, or otherwise, if the proceeds be sufficient—such lien debts being given such priority in payment as they may be entitled to in law or equity, and the residue, if any, to be disbursed among the creditors of said
129 Miller in proportion to the amount of their respective debts, but not exceeding their debts; and the residue, if any, to be paid to the said Miller. He says at a county court held for Boyle county, on the 1st day of November, 1879, in open court, he accepted said trust, executed the bond required by law—which bond was approved by said court—and took an oath as required under the statute.

S. W. Miller, being a resident of Boyle county, and nearly the whole of the tract of land of five hundred and fifty acres, upon which he resided, being in Boyle county, said deed of trust has been recorded in the Boyle county clerk's office, a copy of which is filed as part hereof. He states he has caused said original deed to be recorded in the recorder's office, in Scotland county, Missouri, where the two hundred and eighty acre tract of land is situated. He states on the 7th day of November, 1879, he made and returned to the Boyle county court an inventory of the personal estate of said Miller, which inventory has been recorded in the Boyle county court clerk's office, a copy of same is filed
130 as part hereof. After due notice of the time, terms, and place of sale, he sold said personal property to the highest

bidder, on a credit of six months, which sale was made on the 28th day of November, 1879, and amounted to three hundred and seventy-four dollars and 45 cents. The sale bill is filed as part hereof, marked * * . He says, that real estate mentioned in said deed of trust consists of a tract of land in Boyle and Garrard counties (nearly all in Boyle) on the Danville and Lancaster turnpike road and Dix river, and is bounded by said turnpike road, the lands of James Herring, the old Thomas Cecil Silas Mullins place, and the old Montgomery and Rice farms, containing about five hundred and fifty acres, upon which said Miller now resides. And also about twelve or fifteen acres of land in Boyle county, which the said miller purchased of S. O. Baughman, upon which is erected a still-house, and is bounded
131 by the land of said Baughman, by said turnpike road and Dix river. He says that said Miller has a good and indisputable title to the whole of said real estate. The balance of said real estate is in the State of Missouri, about which he supposes this court can make no order. He says, with the consent of defendant, Miller, and the principal creditors and beneficiaries, under the deed of trust he advertised the small tract of land for sale upon which the still-house is situated, together with said still-house and fixtures, the engine and a separator, and on the second day of January, 1880, in the premises offered them to the highest bidder on a credit of six and twelve months, equal payments, with interest from day of sale, and S. W. Miller, the defendant, was the highest bidder, and the same knocked off to him, but he has failed to execute bonds as required by the terms of the sale.

He says that he supposes said Miller was induced to bid for said property upon the belief that he could take the same as so
132 much going to him in lieu of a homestead, and said Miller says he is still willing so to do. The amount bid by him for said lands, still-house, fixtures, &c., was nine hundred and six dollars. He says that in the deed of trust he was empowered to sell said lands in lots or parcels, as he might deem best. He says that said lands are susceptible of division into three or more parcels, and should be so divided before they are offered for sale. He says the defendants, John J. Craig, W. D. Smith, the First National Bank of Danville, M. J. Durham, executor of John Miller, deceased, are the only creditors of said Miller, so far as he knows, and there may be others. He says defendant Craig has a mortgage on said real estate embraced in said deed of trust, and the other defendants have judgment against said Miller, and have had executions issued on said judgments, and levied on all the property mentioned in said deed, which is in the State of Kentucky, but of the priority of these several liens, their
133 plaintiff is not fully informed, nor does he know the

amount of the indebted of said Miller to each of said defendants, or to others. In view of all the facts in the case, the plaintiff prays:

1st. That the court will make all proper orders and cause all proper steps to be taken to ascertain the valid debts of defendant, S. W. Miller, entitled to share in proceeds of said trust estate, and to require all creditors to purge their claim of any and all usury, and to disclose any offsets or discounts to the same.

2d. That the court will settle all priorities of any and all leins upon said property, and direct how said funds are to be distributed, and to whom.

3d. That said Miller answer and say whether he desires his bid made for the lands and still house to go as a part of his homestead, if he is entitled to a homestead.

4th. That the court will direct said real estate to be sold in such parcels and on such terms and credits as may seem
134 right and proper.

5th. That he be allowed a reasonable sum out of said funds before distribution for his services rendered, and to be rendered in winding up the deed of trust, also the cost of this suit and attorneys' fee, &c.

6th. That he have his accounts settled and a final discharge had on account of said trust.

7th. Finally he prays for all necessary orders and judgments to enable him to fully and completely execute said trust, and for all proper relief to which he may be entitled.

DURHAM & JACOBS,
For Plaintiff.

The deed of trust, inventory, and order appointing trustee, are as follows:

Deed of Trust.

This indenture, made and entered into by and between S. W. Miller, of Boyle county, in the State of Kentucky, of the first part, and M. J. Durham, of same county and State, party of the second part, witnesseth: That whereas said S. W. Miller
135 is indebted in a considerable amount, and in part as follows, to wit: To J. J. Craig in about the sum of $4,320, besides interest, and which debt is secured by mortgage of record in the Boyle county court clerks, to which reference is made to the First National Bank of Danville in about the sum of $13,000, part on the whole of which is in judgment in the Boyle circuit or Boyle court of common pleas; to W. D. Smith in about $1,200, being a balance due on judgment in Boyle circuit or Boyle court of common pleas; to Jno. Miller, executor, in about $4,000, also in judgment in one *or ther* of said courts, reference

is here made to the notes, judgments, or other evidence of indebtedness held by said parties for accurate amount of their respective debts, and said Miller being also indebted to other parties, names and amounts not now remembered, and
136 whereas S. W. Miller is desirous that his creditors shall
337 [have] the benefit of all *the* his property, except such as is exempt by law from execution or attachment for debt, and that such steps may be taken as that said creditors may receive the proceeds of his property, and exact justice be done to all. Now for and in consideration of the premises, and one dollar in hand paid, the receipt of which is acknowledged; said S. W. Miller has bargained and sold, and by these presents does bargain, sell, alien, and convey unto said M. J. Durham, all of his estate, real and personal, except such portion or portions as are exempt by law from execution for debt; in trust, nevertheless, to sell the personal property and sell and convey the real estate upon such terms and credits and at such time as he deems for the best interest of the creditors of said Miller, and in such parts or parcels as he deems for their best interest, and out of the proceeds retain a reasonable compensation for his services, in settling the trust herein created, and pay the costs and fees necessarily incurred in the settlement of the trust, including all necessary and reasonable expenses incurred, and the attorneys' fee
138 for drawing this instrument, then to pay any debts having valid liens on the property by mortgage, execution, attachment, or otherwise, if the proceeds be sufficient such lien debts being given such property in payment as they may be entitled to in law or equity, and the residue of the proceeds, if any, disburse among the creditors of said Miller, in proportion to the amount of their respective debts, but not exceeding the amount of their debts, and if there is any residue after paying compensations, costs, allowance fees, expenses, and debts, to pay the same to said Miller. The intention of the grantor in this instrument is hereby to give no preference to any creditor or creditors, except as such creditor or creditors may already be entitled to the same in law or equity, and nothing is intended to or be construed as giving or making a preference in favor of any creditor or creditors of said Miller. The real estate which is thereby conveyed for the purpose aforesaid consists:

139 First. Of a tract of land, situated the greater or main part thereof in Boyle county, Kentucky, and a small portion in Garrard county, Ky., and containing five hundred and fifty acres, or thereabouts, and which is situated on the waters of Dix river and Dix river and Lancaster turnpike road, and adjoining the old Thos. Cecil and old Silas Wallin's places, and the old Montgomery and Rice farms, and the lands of Jas. Herring, and being the same tract of land upon which said Miller now lives,

and which tract of land, together with all its appurtenances and improvements, except as hereinafter mentioned, is conveyed to said grantee for the purpose aforesaid, with power to sell, in whole or in parcels, except the portions hereinafter reserved. But it is to be distinctly understood that out of said tract is reserved such portion as said Miller may be entitled to for homestead, and which is to be allotted to him if he desires same to be done, or he may consent to sale of all of said tract, and receive in money the sum he is entitled to by law in lieu of homestead, to wit, $1,000.

140 The second tract, which is herein and hereby conveyed to said Durham for the purpose aforesaid, is a tract of fifteen or sixteen acres, lying in Boyle county, Ky., between said turnpike and Dix river, and upon which a distillery now stands, and is the same conveyed to said Miller by Samuel Baughman by deed of record in the Boyle county court clerk's office, and to which reference is made for description. Said tract, together with all its appurtenances and improvements, is conveyed to said grantee. The third tract of land herein and hereby conveyed to said Durham, for the purpose aforesaid, consists of a tract of land of about two hundred and eighty acres, situated in Scotland county, in the State of Missouri, near the town of Ætna, and is the same tract conveyed to S. W. Miller by James H. Miller by deed of record in the recorder's office of said county, and to which deed reference is here made for description, and which tract, together with all its appurtenances and improvements, is conveyed to said Durham, a fee simple title in each

141 and all of said tracts, except as to the portion reserved in the first-mentioned tract, is conveyed to said Durham, and he is hereby invested with full power and authority to sell and convey the same for the purpose aforesaid; but the purchaser or or purchasers of any part or parcel is not to be bound to look to the proper application of the purchase money. The personal property conveyed is all the personal property of said Miller of every sort and kind, including any debts or choses in actions due him, except such portion as is exempt by law from debt, and which is expressly reserved. Said Miller will warrant and defend generally the title to all of the property herein conveyed. All interlineations and erasures made before signing.

In testimony of all of which, witness the hand of said Miller, this 11th day of October, 1879.

S. W. MILLER.

STATE OF KENTUCKY, } *sct.*
County of Boyle. }

I, Reed S. Nichols, clerk Boyle county court, do cer-

142 tify that the foregoing deed of trust from S. W. Miller to M. J. Durham was, on the 11th day of Oct., 1879, acknowl-

edged before me by said W. S. Miller to be his act and deed, and was this day filed and ordered to be recorded, which is now done.

Given under my hand this 13th day of October, 1879.

REED S. NICHOLS, *Clerk.*

A copy.

Attest: REED S. NICHOLS, *Clerk.*

Order appointing Durham trustee.

STATE OF KENTUCKY,
Boyle County Court, Nov. Called Term, Nov. 1, 1880.

M. J. Durham, the trustee named in deed of trust from S. W. Miller, appeared in open court, accepted said trust, took the oath prescribed by law, and, together with J. W. Durham, his surety, executed the required covenant, which the court approves.

A copy.

Attest: REED S. NICHOLS.

Inventory.

A list of the personal property of S. W. Miller, which is not exempt by law from the payment of debts, as exhibited to me by him on this the 7th day of Nov., 1879:

One centre table.
One separator, one wagon.
Two spring wagons.
One rockaway, one wheelbarrow.
143 Two cradles, two plows.
One harrow, one lot old irons.
Three yoke of oxen.
Two aged mules.
Three horses.

There is about five hundred and fifty acres of land; on a lot of twelve or fifteen acres or land there is a still-house and fixtures necessary to run the same.

M. J. DURHAM, Trustee of S. W. Miller.

This day M. J. Durham, trustee of S. W. Miller, made oath before the undersigned that the above list contained all the personal property of the said Miller, after setting apart to him what is exempt from the payment of debts, November 7, 1879.

REED S. NICHOLS,
Clerk Boyle County Court, Ky.

STATE OF KENTUCKY,
Boyle County Court, Nov. Term, 1879.

I, Reed S. Nichols, clerk Boyle county court, do certify that the foregoing inventory of S. W. Miller's trust estate was presented to court, at its above term, and filed and ordered to be
144 recorded, which is now done.

Given under my hand, this 17th day of November, 1879.

Attest: REED S. NICHOLS, *Clerk.*

A true copy.

Attest: REED S. NICHOLS, *Clerk.*

Summons and Return.

On the 20th day of January, 1880, summons issued on said petition, directed to the sheriff of Boyle county, and returned execution on W. D. Smith, J. J. Craig, and S. W. Miller, and, also, M. J. Farris, president of the First National Bank.

January 24, 1880.

Amended Petition.

On the 29th day of January, 1880, the plaintiffs, by attorney, filed in the clerk's office of the Boyle circuit court the following "amended petition:"

The plaintiff, M. J. Durham, trustee of S. W. Miller, asks to amend his original petition herein, and states that two of the sons of S. W. Miller are now living on the lands described in the deed of trust, but they are only tenants, and have no claim to the land as he learns; he makes them parties to this and the original petition, and calls on them, viz: S. D. Miller and Ed. B. Miller, to answer and set up any claims they may have to said lands;
145 he prays, as in his original petition, and for all proper relief.

M. J. DURHAM, Trustee of S. W. Miller.

Summons and Return.

Summons issued in said amended petition, on the 29th January, 1880, directed to the sheriff of Boyle county, and was returned "executed on S. D. Miller and Ed. B. Miller," February 3d, 1880."

And at a term of the Boyle circuit court, held on 3d day of March, 1880, the following order was made:

Order Filing.—Answer Miller's.

"The joint answer of S. D. Miller and E. B. Miller was filed."

Said "Answer" is as follows:

Answer, S. D. and E. B. Miller.

The defendants, S. D. Miller and E. B. Miller, for answer to amended petition, herein says it is true as alleged by the plaintiffs, that they are tenants, and have no claim to the title to any of the lands embraced in the deed of trust to plaintiffs other than as tenants, they are entitled to the possession of a portion of said lands until the 31st day of December, 1880. Under their contract of renting they have the possession, and are entitled to the possession, until the 31st day of December, 1880, of the following described parcels or fields of land, to wit: One field of
146 land containing about thirty acres, and which is known as the "Long field," on the home-place; one field containing about ten acres, and known as the Pond-woods field, on the home-place; one field containing about ten acres, and known as the "Little meadow," on the Hutchings place; one field containing about twenty acres, and known as the "Sallie Elliot" field, on the home-place; one field containing about ten acres, and known as the "Bailey field," on the home-place; one field containing about twenty acres, and known as the Old-meadow field, on the home-place; one field containing about forty-five acres, and known as the field adjoining Mullin's land, on the home-place; one field containing about thirty-five acres, and which lies just immediately back of the mansion house now occupied by S. W. Miller; also, one field containing about ten acres, known as the "Jesse Fox" field, on the Hutchings place; also, the home, and yard, and stable, and lot, just opposite the distillery on the turnpike road and occupied by the defendant, Ed. B. Miller; also, the house, and yard, and stable, and lot, and garden now oc-
147 cupied by the defendant, S. D. Miller. Under their contract of renting, the aforesaid lands were to be continued in wheat and corn, and they were to pay to their landlord rent in kind, to wit: One-half of the corn which they might raise on said land, to be delivered at the usual time for gathering corn in the crib, to be furnished by the landlord on the home-place, and one-third of the wheat which they might raise on said land, to be delivered at the thrashing, the landlord paying his *pro rata* part of the cost and expense of thrashing. At the proper time of sowing grain, in the fall of 1879, to wit, in the month of September, 1879, they sowed about eighty acres of said land in wheat, and the same is now up and looks well.

They have also ploughed some of the land for corn, and are now engaged in preparing all said corn land for planting at the proper time. All of said land is now in possession of these defendants, and they are entitled to the possession until the 31st day of December, 1880. They ask the court to protect
148 them in their legal and equitable rights, and that they be not disturbed in their possession before the expiration of their tenancy, and for all proper orders and relief.

SAM. D. MILLER.
E. B. MILLER.

And at same term of court, held on same day, the following order was made:

M. J. Durham, the executor of John Miller, deceased, filed his answer. The answer is as follows:

"The defendant M. J. Durham, executor of John Miller, deceased, for answer herein says, he admits the execution of the deed of trust by his co-defendant to the plaintiff and the other general allegations to the petition; he consents to a sale of the lands as prayed for, and that the proceeds of the same be applied to the payment of the debts mentioned in the deed of trust according to the rights of the respective parties. As to the right of said S. W. Miller to a homestead in the lands he submits the same to the court upon the facts in the case. He says
149 at the December term, 1878, of the common pleas court for Boyle county he, as executor of John Miller, deceased, recovered a judgment against S. W. Miller for three thousand two hundred and fifteen dollars seventy-four cents, with interest at the rate of eight per cent. per annum from September 1, 1876, until paid, and nine dollars forty-five cents costs of suit. Execution was issued on said judgment on the 28th day of December, 1878, and was on that day placed in the hands of the sheriff of Boyle county, and was by him levied and the lands sought to be sold herein on the day of , 187 , with other executions, and subject to other executions previously levied on the same. He files herewith a copy of said judgment, executions, and return as part hereof. He says there was paid on said judgment by S. W. Miller about the 1st day of November, 1879, one hundred and seven dollars; the balance is just due and unpaid. There is no offset or discount the same, and there is no usury embraced therein. He asks to be protected in all his rights and for all proper relief.

150 M. J. DURHAM,
Executor of John Miller.

At at same term of court, held on 3d day of March, 1880, the following order was made:

Order filing answer of Craig.

The answer of John J. Craig was filed. Said answer is as follows:

The defendant, John J. Craig, for answer herein says that the defendant S. W. Miller, by his promissory note dated the 23d of January, 1878, agreed to pay him twelve months after the date thereof the sum of sixteen hundred and twenty dollars, and to pay him eight per cent. per annum interest thereon from the maturity of said note till paid. Said note is herewith filed and made a part of this answer; said demand is just, and has never to his knowledge or belief been paid, or any part thereof, and there is no offset or discount against the same or any usury therein. Defendant says that simultaneously with the execution of the note above described, and to secure its payment, the defendant S. W. Miller executed to him a mortgage on the
151 following described tract of parcel of land, viz: Lying and being in the counties of Boyle and Garrard, State of Kentucky, on the waters of Dix river, being the entire home tract on which said Miller then lived, except about twelve or sixteen acres on the south side of the Danville and Lancaster turnpike road, on which there is a still-house.

Said tract included the Bart tract of three hundred and fifty-six acres conveyed to said S. W. Miller by the Bart heirs by deed dated Nov. 30, 1835, and recorded in Lincoln county clerk's office; also the tract containing about one hundred and thirty-five acres conveyed to said Miller by Thomas Herring and H. C. Herring, by deed dated January 26, 1859, recorded in Boyle county court clerk's office in deed-book No. 7, page 164; also thirty-five acres and two roods conveyed by R. B. Jacobs as com'r, &c., in deed-book No. 10, page 530, Boyle county court clerk's office, the three tracts thus mortgaged containing about five hundred and twenty-six and one-half acres.

The land so mortgaged to this defendant is all the landed
152 estate of said Miller lying in Boyle and Garrard counties, except the twelve or sixteen acres on the south side of Danville and Lancaster road, on which there is a still-house as above stated; the same conveyed to the plaintiff as trustee and now sought to be sold for the payment of the debts of said Miller. Said mortgage executed as aforesaid was duly recorded in the officer of the clerk of the Boyle county court, and with the certificate of the clerk of said court, showing the same, was duly acknowledged and recorded, is herewith filed, and made a part hereof. He asks and consents to a sale of said land, and claims that out of the proceeds of the sale thereof he has a superior lien to all other parties except Miss Eliza J. Craig, who has a lien equal to his, for the payment of a debt of $2,700 due January 23,

1879, and bearing eight per cent. interest from maturity until paid, said debt being created at the same time with his and secured by the same mortgage above recited. This defendant and said Eliza J. Craig being entitled to the proceeds of
153 the sale of said land ratably and in proportion to their respective debts, should there not be sufficient from the sale of said lands to pay them both, he prays that his claim with that of Miss Eliza J. Craig be paid first and in preference to all others out of the proceeds of the sale of said land, and for all proper orders and decrees for general relief.

JOHN COWAN,
Attorney for Defendant J. J. Craig.

And at same term of court, held on same day, 3d March, 1880, the following order was made:

Order Making Miss E. J. Craig party defendant.

Miss Eliza J. Craig filed her petition and moved the court to make her a party hereto, and, on consideration, she is made a party defendant, and her petition to be taken as her answer.

Said petition is as follows:

Petition.

The petitioner, Eliza J. Craig, states that on the 23d day of January, 1878, the defendant, S. W. Miller, by his promissory note of that date, due twelve months after date, agreed to pay her the sum of twenty-seven hundred dollars borrowed money, and to pay interest thereon after maturity of said note, till
154 it was paid, at the rate of eight per cent. per annum.

Said note is filed herewith and made a part of this petition. Said demand is just, and has never to her knowledge or belief been paid, or any part thereof, and there is no offset or discount against the same, or any usury therein. She says that simultaneously with the execution of the note above described, and to secure the payment thereof, the defendant, S. W. Miller, executed to her a mortgage on the following described tract or parcel of land, viz: Lying and being in the counties of Boyle and Garrard, and State of Kentucky, on the waters of Dix river, being the entire home tract on which said Miller then lived, except about twelve or sixteen acres on the south side, on the Danville and Lancaster turnpike road, on which there is a still-house. Said tract includes the Bart tract, of three hundred and fifty six acres, conveyed to said S. W. Miller by the Bart heirs by deed dated November 30th, 1835, and recorded in Lincoln county court clerk's office; also the tract containing about one hundred and thirty-five acres, conveyed to said Mil-
155 ler by Thomas Herring and H. C. Herring, by deed dated

January 26th, 1859, recorded in the Boyle county clerk's office, in deed book No. 7, page 164. Also thirty-five acres and two roods, conveyed by R. P. Jacobs, as commissioner, &c., in deed book No. 10, page 530, Boyle county court clerk's office,—the three tracts thus mortgaged containing about five hundred and twenty-six and one-half acres. The land so mortgaged to petitioner is all the landed estate of said Miller in Boyle and Garrard counties, except the twelve or sixteen acres on the south side of the Danville and Lancaster road, on which there is a still-house, as above stated, and is the same conveyed to plaintiff as trustee, and now sought to be sold for the payment of the debts of said Miller.

Said mortgage executed as aforesaid was duly recorded in the office of the clerk of the Boyle county court, and with the certificate of the clerk of said court showing the same was duly acknowledged and recorded, and now filed with the answer of Jno. J. Craig in this case, is
156 referred to and made part of this petition. She claims that she has a superior lien on the proceeds of the sale of said land over all other persons, except the defendant, Jno. C. Craig, who has a lien equal to her on said proceeds for the payment of a debt of $1,620, with eight per cent. interest from January 23, 1879, until paid, said debt being created at the same time with her, and secured by the same mortgage above recited—they being entitled to the proceeds of the sale of said land ratably and in proportion to their respective claims, should there not be sufficient from the sale of said lands to pay them both. She asks to be made a party defendant hereto, and that this petition be taken as her answer herein. She asks and consents to a sale of said lands, and that her claim, with that of the defendant, Jno. J. Craig, be first paid, and in preference to all others, out of the proceeds of the sale of said lands, and for all proper orders and decrees, and for general relief.

JNO. COWAN,
Attorney for Petitioner.

And at same term of court, held on the 3d day of
157 March, 1880, the following order was made:

Order filing Demurrer to Petition and answer.

S. W. Miller, by attorney, filed a demurrer to the petition. Ordered that this action be submitted to the court for judgment on the demurrer.

Said demurrer is as follows:

Demurrer.

The defendant, S. W. Miller, demurs to so much of the peti-

tion as alleges a sale of a portion of the real estate, and at which sale it is alleged that defendant purchased, because the same is not sufficient in law.

VAN WINKLE & RODER, *for Defendant.*

And at same term of court, held on same day, 3d March 1880, the following order was made:

The answer of the First National Bank of Danville was filed.

Said answer was as follows:

The defendant, the First National Bank of Danville, states that she is a corporation, duly and regularly organized, and authorized to do business as a bank, under laws of the United States known as the National bank act, and the amendments thereto, and as such corporation she is duly authorized to loan money, discount bills and notes, make contracts, and
158 within the provisions of said acts, to sue and be sued, and do a general banking business, and that her place of business is in Danville, Kentucky. The said defendant states that she recovered a judgment in the Boyle court of common pleas, at the June term, 1878, against the defendant, S. W. Miller, for whom plaintiff is trustee, and against Thomas Anderson, and R. W. Pettis, for the sum of $5,551.75, fifty-five hundred and fifty-one $\frac{75}{100}$ dollars, with interest thereon at the rate of eight per cent. per annum from the 23d day of May, 1878, until paid, and also the further sum of $3,575.26, thirty-five hundred and seventy-five $\frac{26}{100}$ dollars, with interest at the same rate from May 23d, 1878, until paid, and also the sum of $12.30, costs of suit. This defendant further states that on the 13th day of December, 1878, she caused an execution to be issued from the clerk's office of said court upon and for the amount of said judgment, which was on the same day placed in the hands of R. S. Satter, the then duly qualified sheriff of Boyle county, for levy and collection, and which execution was, on the 14th day of December,
159 1878, while in full force and effect, levied by said sheriff on five hundred and forty acres of land, being all the land in Boyle county which passed under the deed of trust to plaintiff, said levy was made at the same time with the levy of an execution against said S. W. Miller, in favor of W. D. Smith, but subject to the mortgage of Craig, spoken of in the petition, as this defendant admits, so far as all the land is concerned, except the small tract on which the still-house is situated, which lies between the turnpike and Dix river, and contains about fifteen or sixteen acres, which tract was not embraced in the mortgage of defendant, J. J. Craig, and Miss Craig, defendant, states that said execution, together with that of the defendant Smith, was also at the same time, levied on four horses, one mule, two cows, four young

cattle, two yoke of cattle, one thrashing machine, engine and separator, all the distilling apparatus for distilling, one buggy, one spring-wagon, two big wagons, a lot of corn, and all farming
160 implements, house and kitchen furniture not exempt from execution, which embraced all the personalty mentioned in the inventory on file with plaintiff's petition, except one spring wagon, one rockaway, one lot of old iron, one yoke of oxen, and one mule, defendant states that by the levy of said execution, and the execution of defendant Smith, a lien superior to any other claim, except that of Smith, and of equal dignity with said defendant Smith's claim, was created on said distillery, lot of land above described, and on all the personalty which came to the hands of plaintiff, except the spring-wagon, rockaway, old iron, yoke of oxen, and mule, above described and not embraced in said levy, and a further lien was created on the whole of the land in Boyle court, which passed to plaintiff under said deed of trust, besides said distillery tract, but the lien on the remainder of the said lands, excluding the distillery lot is subject to the mortgage of defendant, J. J. Craig, and Miss Craig, on the same, is equal with the execution claim of defendant Smith, but is superior to all other liens or claims whatsoever, this defendant's lien thus
161 created, is for the whole of said execution and judgment debt above set forth, and the same still exists and remains in full force and effect, and should be so estimated and allowed as prior claims in the distribution of the estate in plaintiff's hands as trustee to the extent above set forth, except that said defendants are entitled to the following credits, to wit: The debt for $3,575.26 is entitled to a credit of $144, paid May 25, 1879, and a further credit of $45.51, as of date September 19, 1879; and the said debt of $5,551.75 is entitled to be credited with $70, May 25, 1879, and $70.70, September 19, 1879, and the further sum of $1,254.56, realized out of the estate of Bettis, September 24, 1879. No other part of either of said debts has ever, to the knowledge or belief of defendant or defendant's president, who will verify this answer, been paid. There is no *effect* or discount against either of said debts, nor any usury embraced in either of them, but the same are just, due, and owing. A certified copy of said judgment is filed herewith, a part thereof, and a certified copy of said execution, showing the liens herein alleged, will also in due time be filed herein as part hereof. This de-
162 fendant further states that at the December term, 1878, of the Boyle court of common pleas, she recovered in said court a judgment against the defendant, S. W. Miller, for the sum of twenty-five hundred dollars, with interest thereon at the rate of eight per cent. per annum from the 23d day of September, 1878, until paid, and also the further sum of twenty-five hundred dollars, with the same interest from the 23d day of May, 1878,

until paid, subject to a credit of $421.02, paid August 7, 1878, and the further sum of $500, paid September 23, 1878. This defendant states that on the 28th day of December, 1878, she caused an execution of *fieri facias* to be issued from the clerk's office of said court for the full amount of said judgment, including $10.60 costs, and while the same was in full force and effect, she placed said execution in the hands of R. S. Salter, who was then the duly authorized, qualified, and acting sheriff of Boyle county for levy and collection, and said sheriff Salter did immediately, on the same day, to wit, December 28, 1880, levy said exe-
163 cution, together with another execution which was in his hands, in favor of the plaintiff, M. J. Durham, as executor of John Miller, deceased, upon the same property, on which the former above-described levies had been made of the executions in favor of this defendant and the defendant Smith, and on the same land on which the mortgage to defendants J. J. Craig, and Miss Craig had been given. This defendant states that by virtue of the said levy of said sheriff Salter of the execution last above described, on the 28th day of December, 1878, she acquired a lien which is still valid and subsisting, and of equal, but of no greater dignity than that created by the levy of execution of Miller's executor, but being, together with said Miller's executor's execution, inferior and subject to the mortgage debts of said defendants J. J. Craig, and Miss Craig, as the portion of land above described, and being inferior and subject to the first described execution of this defendant, and also the execution of defendant, Smith, but being prior and superior to all other debts against said S. W. Miller's estate, so far as all the land which lies in Boyle county, and which came to the hands of
164 plaintiff, and so far as all the personalty described as levied on under the first execution, and which went to plaintiff's hands is concerned, and this defendant claims that this priority and superiority should be allowed and adjudged in her favor in the settlement of said distribution of the estate of said Miller in plaintiff's hands.

This defendant further states the first described $2,500 is entitled to a credit of $31.06, as of date September 19, 1879, and the other $2,500 debt is entitled to an additional credit of $20.39, as of date September 19, 1879; no other part of either of said debts has ever to the knowledge or belief of defendant or her president, who verifies this answer, been paid, there is no offset or discount against said debt, or either of them, and there is no usury embraced in said debts, or either of them, but both said debts are just, due, and owing and wholly unpaid, except as stated above; a certified copy of said judgment is filed herewith as part hereof, and a certified copy of said execution showing the

liens herein allowed will also, in due time, be filed herewith as part hereof.

165 This defendant states she is informed, believes, and charges that the defendant, S. W. Miller, was not, at the time of the levy of either of the executions herein described, a *bona fide* house-keeper with a family, and defendant has no knowledge or information sufficient to form a belief that said Miller was, and she therefore denies that said Miller was a *bona fine* house-keeper with a family either at the time of the levy of either of said executions or at the time of the execution of the deed of trust to plaintiff, a copy of which is filed with the petition, she charges and avers that said Miller is not entitled to any homestead as against either or any of defendant's debts, and she demands full proof of all facts necessary to show him to be entitled to homestead rights in any of said lands; she claims, however, that if the court should adjudge said Miller to be entitled to homestead, that he should be required to receive as a portion of said homestead, the distillery lot which he is charged in the petition to have bought at the price of $906, at which the same was struck off to him as the highest and best bidder, and that he should be required to receive the same at said price, but that as be-

166 tween herself and other creditors of said Miller, she be compensated for the taking of said property, on which she and defendant Smith held liens, out of other estate in plaintiffs' hands as trustee, in such a manner and way as may be equitable and just. Defendant states that such legal commissions as the sheriff is entitled to on said debts should also be allowed as prior claims and part of the cost in said cases, she prays for the allowance of all her claim herein set forth, as prior and superior claims to the extent herein set forth; the $3,575.26 and the $5,551.75 debts to be adjudged to be superior to all other claims, except the mortgage debts of defendants J. J. Craig and Miss Craig, on the property embraced in said mortgage, and except the Smith debt which she prays she may be adjudged to share with in the distribution of said estate, in proportion to amount of said debts and said Smith debt, and that she be adjudged together with Miller's executor to be entitled to a lien and priority on the property levied on to the amount of said Miller's debts, and the two $2,500 debts of this defendant *pro rata*, but subject to the

167 Craig mortgage and the other execution debts of said defendant and Smith in manner herein stated, and she prays for judgment refusing to allow homestead to defendant, S. W. Miller; or if he is adjudged to be entitled to the same that he be required to take as a portion thereof the distillery tract, and that this defendant be compensated therefor, and she prays for a speedy sale and distribution of the trust property, and for all proper orders, judgments, decrees, and relief, general and special.

SAMUEL HARDING, *Attorney for Defendant.*

And at same term of court, held on same day, 3d March, 1880, the following order was made:

Order Sustaining Demurrer and leave to amend.

The court having considered the question of law arising on the defendant's demurrer to the petition, the said demurrer is sustained, and the petition is adjudged insufficient so far as it alleges a sale of real estate to S. W. Miller. Leave is given to file an amended petition.

And at same term of court, held on 5th day of March, 1880, the following order was made:

168 "Plaintiff produced and filed an amended petition."

Order Filing Amended Petition.

Said amended petition is as follows:

The plaintiff, M. J. Durham, trustee of S. W. Miller, says, by way of amendment to his original petition, by an agreement of the defendant, Miller, and the principal creditors of said Miller, he advertised the still-house property and grounds, containing twelve or fifteen acres; all the fixtures of said still-house; the engine and a separator for sale, and on the 2d day of January, 1880, he offered the same at public outcry to the highest bidder, on a credit of six and twelve months, and the defendant, S. W. Miller, became the purchaser or highest bidder, at the price of nine hundred and six dollars; this plaintiff was his own crier or auctioneer. After the bid had been knocked off to the defendant he demanded of him his bond, as required by the terms of the sale, and offered him a written certificate of his purchase. But the defendant refused to execute his bond or receive a certificate of purchase. After the defendant had made the bid for said property, upon the belief, and only on the ground
169 that the same was to be taken and received by him as so much of his homestead right, and refused to execute his bond for the same, he demanded a deed for the same by reason of his rights to a homestead, and at the filing of his original petition defendant said he was still willing to receive said property as so much towards his homestead. He says he asks that defendant, Miller, may be compelled to take said property at his bid, in the event he may be entitled to a homestead. The engine sold is used to run both the mill in the still-house and the separator. The engine and separator are worth about one-half as much as the real estate sold, as he supposes. Wherefore, &c.

M. J. DURHAM, *Trustee.*

And at same term of court, held on 6th day of March, 1880, the following order was made:

Demurrer to Amended Petition filed.

"The defendant, S. W. Miller, by attorney, filed a demurrer to plaintiffs' amended petition.

Said demurrer is as follows:

The defendant, S. W. Miller, demurs to the plaintiff's amended petition, filed herein, on the ground that it does not state facts sufficient to constitute any cause of action against him.

S. W. MILLER.

170 And at same term of court, held on same day, 6th of March, 1880, the following order was made: Ordered, That this action be and the same is submitted to the court for judgment on the demurrer of the defendant, S. W. Miller, to amended petition of plaintiff.

And at same term of court, held on same day, 6th of March, 1880, the following order was made:

This day came the parties, by their attorneys, and the court having considered the question of law arising on the defendant's, S. W. Miller, demurrer to the amended petition, the said demurrer was sustained, and the petition, as amended, so far as it relates to an alleged sale of the distillery, real estate, fixtures, and property mentioned in the amended petition to S. W. Miller, is adjudged insufficient, to which plaintiff excepted.

The defendant, S. W. Miller, produced his answer, which was filed. Said answer is as follows:

The defendant, S. W. Miller, for answer herein, states: It is true that he executed to plaintiff, M. J. Durham, the deed of trust mentioned in the petition; that at the time of making of said deed he was residing and had his home on the land
171 first mentioned in said deed of trust, being the tract described as the home tract, consisting of some five hundred and fifty acres, and out of said tract a homestead, in express terms, is reserved and secured to this defendant, and to that extent no conveyance was made to plaintiff, but, on the contrary, such homestead is to be allotted to defendant in land, or he has the right and privilege of allowing the whole of the lands to be sold, and in lieu of a homestead in land to take and demand one thousand dollars in money; that said homestead is not located specifically in said tract, but is secured as aforesaid, leaving the separator of it from the remainder of said tract or specific allotment to be done in the future, and this expressed in and what is meant by the terms, "out of said land is reserved such portion as said Miller may be entitled to for homestead, and which is to be allotted to him," &c., used in said deed of trust. He now claims and asserts his right under said deed to a homestead in said land, and says by its terms the plaintiff and all claiming

under him are estopped to deny his right to the same. He
172 will, in due time, determine whether he will waive the allotment specifically of homestead, and take money in lieu thereof, according to the terms of said deed. He does not now waive allotment.

P. Q.—Further answering, said defendant states that he is a housekeeper, with a family, residing on the tract of land first named in the deed of trust, and called in it the homeplace, and was at the time and before the making of said deed; and he claims the same and now asserts his right thereto, and the same was and he had the legal right then and now to reserve the same out of said conveyance, and he has had such homestead right for many years past, and has at no time relinquished or waived the same, and he claims and asserts the same against all persons whatsoever. He asks for all proper relief.

VANWINKLE & RODER,
For Defendant Miller.

And at the same term of court, held on the 7th day of March, 1880, the following order was made:

The plaintiff, by attorneys, filed a reply to the answer of defendant, S. W. Miller, and joint answer of defendants, S. D. and E. B. Miller.

Said "reply" is as follows:

Reply.

173 The plaintiff, M. J. Durham, trustee of S. W. Miller, for reply to the answer of S. W. Miller, and the joint answer of E. B. Miller and S. D. Miller, says he denies that at the time of making of the deed of trust by S. W. Miller to him the said Miller was a housekeeper with a family, and is entitled to a homestead; he denies he was a housekeeper with a family, at the date of the deed of trust, or at the levy of the execution on the land; he denies said Miller is entitled to a homestead in the lands described in the petition; for further reply says, he does not know nor has he any such information upon which he can form a belief as to whether the defendants, S. D. Miller and E. B. Miller, rented of S. W. Miller a part of the lands described in the petition, for the year 1880, as charged in their answer, and requires proof of said renting; wherefore he prays as in his petition.

M. J. DURHAM, Trustee of S. W. Miller.

And at a term of said court, held on the 10th day of March, 1880, the following order was made:

Order Submitted.

Ordered: That this action be submitted to the court for judgment.

174 And at the same term of court, held on same day, the following judgment was rendered:

Judgment.

The summons in this case having been fully executed more than ten days before the commencement of this court, and the defendants having answered, the court now adjudges that this cause be now referred to the master in chancery, to ascertain and report the debts against the estate of S. W. Miller. He will also report what liens have been created upon the estate of said Miller before the making of the deed of trust, the nature and character of said liens, as also the date of said liens and the priority of of the same. Said master in chancery will report the amount of the estate which came into the hands of the trustee; he will advertise in the "Kentucky Advocate," for sixty days before the 1st of August next, for all claims against said estate, to be presented and properly proven by said day. The defendant, S. W. Miller, having set up a claim to a homestead in the lands described in the petition, it is now agreed between said Miller and all the parties herein that the said Miller shall have the following lands and property as his homestead, which land and property is
175 to belong to the said Miller absolutely, and it or its proceeds is not to be taken hereafter to pay any of the debts he now owes to the parties herein or any of them, and said Durham, the trustee of said Miller, will make him a deed for said lands and property, which are as follows, viz.: All the lands on the south side of the Lancaster and Dix river turnpike road, and bounded by said road and the lands of S. O. Baughman and Dix river, containing about twelve or fifteen acres, more or less; also the still-house on said lands, and all the fixtures thereof; also the engine used in running the mill in the still-house, and also a separator; also all the lands lying on the north side of said turnpike, and between said road and Dix river, immediately east of the iron bridge over said river, and containing about seven and one-half acres; also all the cliff land from the eastern boundary of the above tract of land around to the mouth of Boone's creek, and containing about twenty acres, more or less; said cliff land extends down only to the high water mark on said river, and there is also reserved to the purchaser of said lands the right to build dams or water gaps against said cliff in
176 such places as they may desire; it is further agreed that the defendant, Miller, is to have the use and occupancy

of the house where he now lives, the garden, stable, and stable lots and out-houses until the 1st day of September next, at which time he is to give the entire and peaceable possession of the same to the trustee herein, and on his failure so to do the said trus- the may have a writ of *habere facias* possession for the same, and the clerk of this court will issue the same. The said Miller and the defendants, S. D. Miller and Ed. B. Miller, having claimed to have rented certain of said lands until the 31st day of December, 1880, they are permitted to hold said houses and lands until that time, on the terms as set out in their answer herein, but they agree to give whoever may be the purchaser of said lands the privilege of seeding any time after the 1st day of September next, said seeding to be done without injury to said Millers, and said purchasers to have free access to said lands for the purpose only of seeding. Said S. D. Miller and Ed B. Miller agree to give said trustee the full, entire, and peaceable possession of the house and lands they use and occupy on or before the 31st day of December next, and on their failure so to do the trustee, Durham, may have a writ of *habere facias*
177 *possessionere* against each of them; and the clerk of this court is directed to issue the same, the remainder of said lands, except what is here given to S. W. Miller as a homestead, and what is herein allotted to him until September 1st next, and what is claimed by the said S. D. Miller and Ed. Miller, is by agreement of the defendant, S. W. Miller, delivered up to the trustee herein; and said trustee will rent such parts of the same as he thinks should be rented, until he sells the same; he will also collect the rents as they may fall due, and report the amount to the next term of this court; after collecting the same, it is further ordered that all of said lands, except what has been herein allotted to said S. W. Miller, be sold at such time as said trustee may think best for the interest of all parties concerned, and said trustee will make said sale; he will sell said land at the dwelling-house of S. W. Miller, to the highest bidder, at public out-cry, on a credit of six and twelve months, from the 1st day of September, 1880, taking from the purchaser's bonds with approved security, payable to himself as trustee aforesaid, bearing six per cent. interest, from September 1, 1880, and having the force and
178 effect of judgments, and retaining also a lien on the lands for the purchase-money; before making said sale he will advertise the time, terms, and place of sale, by printed bills, posted in Danville, Lancaster, Stanford, Harrodsburg, and in the vicinity of the lands, for twenty days before the day of sale, and by three weekly insertions in the "Kentucky Advocate;" he will offer said lands for sale, in five or more parcels, to the highest bidder, and he will then offer two or more, and all of said parcels, together to see if more will be bid for them jointly than sep-

arately, and he will sell to the highest bidder and best bidder; he will sell said lands in the following parcels: First, that bounded as follows, beginning at a point in the middle of Dix river westerly from the dwelling-house, and running thence S. 84 E. 14 poles to a walnut tree close by the fence; thence S. 15 E. 22 poles; thence N. 48 E. $53\frac{20}{100}$ poles to a point on the north side of the lane near the house; thence with the lane S. 39 E. $50\frac{72}{100}$ poles to a slight angle in the lane; thence N. $53\frac{1}{4}$ E. $210\frac{80}{100}$ poles to high-water mark on the north side of Dix river, and ten poles east of the mouth of Boone's creek; thence
179 with the meanderings of the cliff of Dix river and at high-water mark on the north side of the river in a westerly direction to the ford of the river, at the mouth of the creek; thence S. 7 E. at the middle of the river; thence with middle of river bed to the beginning, containing (138) one hundred and thirty-eight acres.

2d. The following, beginning at the ford at high-water mark on the north side of Dix river, and running thence N. 7 W. $18\frac{50}{100}$ poles up the creek towards an old mill; thence, leaving creek, N. 66 E. 115 poles; thence east 32 poles to a sugar tree; thence S. 63 E. $84\frac{80}{100}$ poles to a sugar tree on the east side of Boon's creek, and about 10 poles up the creek from its mouth; thence S. 38 E. 10 poles; thence S. $53\frac{1}{4}$ W. to high-water mark on the north side of Dix river; thence with the meanderings of the river, cliff, and shore at high-water mark, westerly, and down the river to the beginning, containing (23) twenty-three acres.

3d. The following, beginning at high-water mark on the north side of Dix river, ten poles up the river from the mouth of Boone's creek, and running thence S. $53\frac{1}{4}$ W. $210\frac{80}{100}$ poles to north side of the lane; thence S. 27 E. 52 poles;
180 thence, leaving lane, N. 76 E. $176\frac{64}{100}$ to the eastern cliff of the river at high-water mark; thence with the same in its meanderings at high-water mark down the river to the beginning, containing (100) one hundred acres.

4th. The following, beginning at a point on the east side of Dix river, at high-water mark corner, to (3d) and running thence S. 76 W. $176\frac{64}{100}$ poles to the lane; thence with same S. 27 E. 42 poles to a large black-ash tree at the north of the lane; thence with road at the cliff S. 53 W. $19\frac{60}{100}$ poles; thence S. 55 W. 32 poles to the middle of the pike; thence with the middle of same N. 68 E. $54\frac{80}{100}$ poles to a sycamore stump near the water edge, below the bridge; thence across the river S. 40 E. $9\frac{20}{100}$ poles; thence with the meanderings of the river at high-water mark on the eastern margin down the river to the beginning, containing (100) one hundred acres.

5th. The following, beginning in the middle of the river same point as (1st) and running thence S. 15 E. 22 poles; thence N.

48 E. $53\frac{20}{100}$ poles to the lane near the dwelling-house; thence with the lane S. 39 E. $50\frac{72}{100}$ poles; thence S. 27 E. 94 poles to a large black-ash tree near the mouth of the lane;
181 thence S. 53 W. $19\frac{60}{100}$ poles along dirt road; thence S. 55 W. 32 poles to the middle of the Danville and Lancaster pike; thence with same S. 68 W. $26\frac{16}{100}$ poles to a point in pike a few feet south the corner of the warehouse; thence N. 37 W. 16 poles, passing through a small black-walnut tree near the southeast corner of the warehouse, and also through a large sugar tree near the far corner of the lot; thence N. 68 E. 3 poles; thence N. 37 W. 140 poles to the middle of Dix river; thence with middle of same up the river with its meanderings to the beginning, containing 78 acres, 2 roods, 31 perches.

6th. The following, beginning in the middle of Dix river, and at the west corner of the above-described lot of land, (5th,) and running thence S. 37 E. 140 poles; thence S. 68 W. 3 poles; thence S. 37 E. 16 poles to the middle of the pike; thence with the same S. 68 W. 13 poles; thence with same S. 59 W. $65\frac{60}{100}$ poles to the corner Case's land; thence with Case's line N. 37 W. 144 poles to middle of the river; thence with meanderings of same up the river to the beginning, containing (70) seventy acres.

The trustee will take such steps as are necessary to keep said lands in repair until they are sold, by agreement of
182 the parties herein. M. J. Durham, trustee, will sell said lands and collect the proceeds, and by a further agreement of the parties herein, the trustee will pay S. W. Miller twenty-five dollars in money out of the funds of the estate. Said trustee will make a report of his actions and doings herein to the next term of this court.

The said Durham, as directed herein, produced to the court the deed to S. W. Miller for the lands and property allotted to him, which deed having been examined and approved and so endorsed by the court on the deed, the clerk of this court will transmit the same, properly certified to the clerk of the Boyle county court, for record, it is now therefore adjudged that the said S. W. Miller be and he is reinstated with the title of said land and property mentioned in said deed.

And at a term of said court, held on the 20th day of September, 1880, the following was made:

Order filing Report.

"The report of M. J. Durham, trustee, filed in vacation, now noted of record."

"The report referred to is not now on file in this office."

And at the same term of court, held on same day, the following order was made:

Order filing Report of Commissioner.

183 Fon. T. Fox, master commissioner, this day filed reports of claims in each of above cases.

Said report is as follows:

The undersigned, master commissioner of the Boyle circuit court, reports that he advertised for 60 days before the first day of August last, in the Kentucky Advocate, as required by the judgment and order of reference herein, at the last March term, for the production of proof and claim against S. W. Miller which existed at the time of the making of the deed of trust on file, and he reports the following claims, which have been presented to him, properly proven, and which are allowed, to wit:

1. Costs of suit and allowances	$	
2. Marrs & Thomas (printing bill)	1	50
3. Eliza J. Craig, note, $2,700, secured by mortgage, and 8 per cent. interest to September 20, 1880	3,058	20
4. John J. Craig, note, $1,620, secured by same mortgage, and 8 per cent. interest to same date	1,834	92
	$4,894	62
5. Pi S. Salter, half com. for levying four executions mentioned below, on the amount realized from sale of lands and personalty, after deducting Craig debts	117	45
6. W. D. Smith, judgment for $1,824.39, secured by execution lien, less the credits given, $10.75 costs, 8 per cent. interest to Sept. 20, 1880	1,127	52
184		
7. First National Bank, Danville, judgment for $5,551.75 and $3,575.26, secured by execution lien of same date as above, less credits given and $12.30 costs, and 8 per cent. to same date	9,288	28
8. John Miller, executor, judgment for $3,215.74, secured by execution lien, less credits given, $9.45 costs, and 8 per cent. interest to same date	4,161	50
9. First National Bank, Danville, judgment for $2,500 and $2,500, secured by execution lien of same date as Miller's, less credits given, $10.60 costs, and 8 per cent. interest to same date	4,630	05
	$24,219	42

Your commissioner reports that the debts of Eliza J. Craig

and Jno. J. Craig, aggregating, September 20, 1880, $4,893.12, are secured by the same mortgage, which was given January 23, 1878, and which covered all the lands of said Miller embraced in the deed of trust on file, except that portion which was set apart to said Miller as a homestead, and for which lands
185 the trustee realized, as shown by his report filed herein, the sum of $12,110, and these claims of Eliza J. and Jno. J. Craig has liens equal with each other, but first and superior to the execution liens hereinafter mentioned, on the lands covered by said mortgage and sold by the trustee, or their proceeds.

R. S. Salter's claim for half commission is entitled to be satisfied out of the proceeds of the lands next after the Craig debts. The claims of W. D. Smith for $1,127.52, and of the First National Bank for $9,288.28, aggregating, on the 20th day of September, 1880, $10,415.80, are secured by execution liens of date the 13th day of December, 1878, on the lands and personalty conveyed to M. J. Durham, trustee by the deed of trust on file, subject to legal exceptions, and said claims of Smith and the bank, including the claims of R. S. Salter for half commission, have liens equal with each other, but inferior to the Craig liens and superior to the other execution liens hereinafter mentioned on the lands sold by the trustee, or their proceeds, and have liens superior to the Craig liens or the other execution liens hereinafter named on the proceeds of the personalty sold by the trustee, and amount-
186 ing to $374.45, as shown by his report herein filed. The claims of John Miller, executor, for $4,161.50 and of the First National Bank for $4,630.05, aggregating, September 20, 1880, $8,791.55, are secured by execution liens of date December 28, 1878, on the same lands and personalty, subject to legal exceptions, on which the executions of Smith and the bank were levied December 13, 1878, and which liens of Miller's executor and the bank are equal with each other, but inferior to both the liens of the Craigs on the lands and the liens of Smith and the bank on the lands and personalty as above given. All of which is respectfully reported, September 15, 1880.

FON. T. FOX, *M. C.*

And at same term of court, held on same day, 20th September, 1880, the following order was made:

Order filing Report of Sale.

M. J. Durham, the trustee, filed a report of sale of the land sold herein by him.

Said report is as follows:

Report of Sale.

As directed by the judgment rendered herein at the March term, 1880, I advertised the lands for sale by three weekly inser-

tions in the Kentucky Advocate and by printed bills posted in
Danville, Stanford, Harrodsburg, Nicholasville, Bryants-
187 ville, Hustonville, Perryville, Barksville, Mitchellsburg,
and several public places in the vicinity of the land, for more than twenty days before the day of sale, and on the 7th day of August last at the residence of said Miller I first offered said lands at public outcry and to the highest bidder. I first offered each tract separately, when John W. Miller bid thirty-eight hundred and ninety-eight dollars fifty cents ($3,898.50) for the one hundred and thirty-eight acre tract, A. Rice bid one hundred and five dollars for the twenty two acres of cliff land, Jeremiah Kincaid bid two thousand dollars for the northern one hundred acre tract, James Herring bid seventeen hundred dollars for the southern one hundred acre tract, R. S. Salter bid fifteen hundred and seventy-five dollars for the seventy-eight acres, two roods, and thirty-one poles, and the said Salter also bid seven hundred and seventy dollars for the seventy acre tract. These were the highest and best bids on these respective tracts. I then offered the one hundred and thirty acre tract and the two one hundred acre tracts together, and James Herring was the highest bidder at eight thousand and thirty-eight dollars. I then offered the seventy-eight acres, two roods, and thirty-one poles and the seventy acres
together, and John W. Miller was the highest bidder at
188 twenty-nine hundred dollars. I then offered the whole of
said lands of five hundred and eight acres, two roods, and thirty one poles, when the First National Bank of Danville was the highest and best bidder at the price of twelve thousand one hundred and ten dollars ($12,110.) This being more than was bid for the lands than in either of the other ways in which they were offered, I declared said bank the purchaser thereof at said sum. I took the notes of said bank, with John A. Quisenberry surety, payable in six and twelve months from September 1, 1880, with six per cent. interest from said date. Each note was for six thousand and fifty-five dollars ($6,055.) Said notes with one of the notices of the sale are returned herewith. I did not have said lands appraised, but the defendant S. W. Miller waives the same, and I file his written request to have said sale confirmed. I gave said bank a certificate of purchase stipulating for a conveyance of said lands on the full payment of the purchase-money. In selling said lands I reserved to S. W. Miller the right to get
water from the spring near the still-house to run said dis-
189 tillery, and only for said purpose. As directed by said
judgment I took charge of the grass lands not rented, and pastured as much stock as I could get, and received for pasturage the sum of one hundrd and ninety-one dollars forty cents, and expended out of the same forty-six dollars in repairing fences, &c., so as to secure the crop on the farm, leaving in my hands for

pasturage the sum of one hundred and forty-five dollars forty cents. The proceeds of the wheat and corn crops raised by the tenants I will report hereafter when said crops are sold. The bank, the purchaser of the lands, desires to pay the purchase-money, and they ask the court to permit him to collect and distribute the same according to the rights of the parties herein. He has paid certain expenses for said estate which he has stated in another report filed in the papers of this suit. There are other expenses to be paid, which when paid he will report to the court.

This September 11, 1880.

M. J. DURHAM, *Trustee.*

Written request waiving right of Appraisement of Property.

The lands specified in the deed of trust and ordered to be sold by a judgment herein having been sold by the trustee on the 7th day of August, 1880, without having been appraised, but as the same was bid off at the price of $12,110, and as this was
190 more than two-thirds of what said lands would have been appraised at, I ratify said sale and waive my supposed right I might have to redeem the same, and ask the court to confirm said sale.

This August 9, 1880.

S. W. MILLER.

And at same term of court, held on 20th day of September, 1880, the following order was made:

Order filing Petition of Dunlap's administrator to be made party.

G. W. Dunlap, administrator of G. W. Dunlap, deceased, filed his petition to be made a party hereto, and, on consideration, he is made a party defendant hereto, and his petition to be taken as his answer.

Said petition is as follows:

Petition.

The petitioner, G. W. Dunlap, as administrator of G. W. Dunlap, deceased, states that on the 8th day of October, 1877, S. W. Miller executed and delivered to his interest his promissory note, and agreed to pay him on the 9th day of October, 1880, the sum of $109.33. Said note is exhibited herewith and made part hereof. It is just, and has never, to petitioner's knowledge or belief, been paid. There is no offset or discount against it, except $38.80 paid thereon as of about first day of May,
191 1880; nor is there any usury embraced therein. He states that on the day of June, 1880, the said G. W. Dunlap departed this life intestate, a citizen of Garrard county, Ky.;

that at the June term of the Garrard county court, 1880, petitioner was duly appointed and qualified as the administrator of said decedent, and is now acting as such. He exhibits herewith an official copy of the order of appointment, and makes same part hereof. He prays to be made a party defendant hereto, and that this petition be taken as his answer herein; that said demand be allowed and paid, and he prays for all proper relief.

GEO. W. DUNLAP.

And at same term of court, held on 24th September, 1880, the following order was made:

Order filing Report.

M. J. Durham, the trustee, filed a report of his expenses.

Said report is as follows:

Report of Expenses.

The undersigned, trustee, would report that he has paid out the following sums in the execution of said deed of trust, and for which he asks a credit for in settling his accounts, viz.:

To R. S. Nichols, county clerk		$7 45
To J. C. Randolph, surveyor		31 00
192 " Pope & Hutchings, chainmen		6 00
" I. S. W. Miller, for judgment herein		25 00
To T. D. Inglish, for crying sale		15 00
" S. M. Boane, " "		6 70
" J. W. Durham, clerking at sale		2 00
" C. S. Martin, recording deed in mo.		1 90
" Mars & Thomas, printer's bill		15 50
" Taxes for 1880		52 85
Total		$163 40

There are other expenses connected with the renting of the land and preserving the crops, which he will file hereafter. This September 20th, 1880.

M. J. DURHAM, *Trustee.*

And at same term of court, held on same day, 24th September, 1880, the following order was made:

Order submitted.

Ordered that this action be submitted to the court for judgment.

And at same term of court, held on same day, the following judgment was entered:

Judgment.

The report of the master in chancery, filed herein September 20th, is approved, no exception to the same having been filed. The trustee, M. J. Durham, having filed his report of the sale of the lands on the first day of this term of the court, and
193 no exceptions having been filed to the same, said report and sales made by him are ratified and approved. It appearing from a report herein of the trustee that he has paid out in expenses for surveying and selling the land and personalty, taxes, &c., the sum of one hundred and sixty three dollars and forty cents ($163.40), said payments are approved. The purchasers of the lands desiring now to pay the purchase-money, by consent of the parties said trustee is directed to collect the same, and out of the same and the proceeds of the personal property—viz.: ($374.45) three hundred and seventy four dollars and forty-five cents, and the four hundred and sixty-six dollars and thirty-three cents ($466.33) which he collected from certain dividends in suits in the Garrard circuit court—he will retain said one hundred and sixty-three dollars and forty cents ($163.40). He will then pay the clerk. He will pay R. L. Salter one hundred and seventeen dollars and forty-five cents ($117.45), the amount allowed by the master in chancery. He will pay F. T. Fox, the master in chancery, forty dollars ($40) for his report, by consent of the parties. He will pay R. P. Jacobs twenty-five dollars ($25) for serving the deed of trust; to Durham and
194 Jacobs the sum of one hundred and twenty-five dollars ($125) as attorneys in preparing and managing the case; and there are allowed, by consent of the parties, for the present to the trustee two hundred and fifty dollars ($250) for his trouble in selling, cutting, and distributing said estate and renting lands. But out of the above funds he will only retain one hundred and fifty dollars ($150); the other one hundred dollars ($100) he will retain out of the rent money when collected. After the above sums are paid, he will then pay the claims reported in favor of Eliza J. Craig and Jno. J. Craig, and then distribute the residue between W. D. Smith and the preferred claim of the First National Bank of Danville, Ky., in proportion to said claims as reported by the master in chancery. He will take receipts for all sums paid by him, and report the same to this court.

And at same term of court, held on the 25th day of September, 1880, the following order was made:

Order filing Report.

The trustee, M. J. Durham, filed a report of distribution. Said report is as follows:

195 The undersigned, trustee of S. W. Miller, would report as directed by a former judgment herein, he has collected the money arising from the sale of the land, and has distributed it, and the other funds in his hands as described in said judgment. His account stands as follows:

Amount of sale of personalty		$374 45
Amount received from suits in Garrard circuit court		466 33
Amount of sale of lands		12,110 00
Interest on same		48 44
Total		$12,999 22
By amount paid in former report and allowed in judgment	$163 40	
By clerks, sheriffs, and rect	33 30	
By master commissioner and rect	40 00	
By R. L. Salter "	117 45	
By R. P. Jacobs "	25 00	
By Durham and Jacobs "	125 00	
By A. C. J. Durham, trust., "	150 00	
Amount forward	$654 15	$12,999 22
Amounts forwarded	$654 15	$12,999 22
By Eliza J. Craig's rect	1,836 35	
By J. J. Craig's "	3,060 60	
By First Nat. Bank "	6,642 12	
By W. D. Smithe "	806 00	
		$12,999 22
Balance		000 00

196 He files the receipt for said sums as part hereof, the purchaser of the lands, the First National Bank, having paid the entire purchase-money is entitled to a conveyance of said lands.

Respectfully reported, this September 25, 1880,

M. J. DURHAM, *Trustee.*

And at same term of court, held on the 25th of September, 1880, the following order was made: M. J. Durham, the trustee, herein, having made and filed his report, showing that the First National Bank of Danville, the purchaser of the land sold herein, has paid all the purchase money, and that he has distributed the same (as well as the proceeds of the personalty and the $466.32 he received from suits in the Garrard circuit court, per W. O Bradley,) as directed by a former judgment, and has filed the receipt for said payments, said report and the payments are ratified and approved.

James S. Chrisman is appointed this court's commissioner to

make to the First National Bank of Danville a deed for the lands they purchased for and in behalf of S. W. Miller, M. J. Durham his trustee, and therefore the said Chrisman signed and
197 acknowledged said deed in open court, and the judge thereof having examined and approved the same, and so endorsed thereon, the clerk of this court will transmit said deed, properly certified to the clerk of the Boyle county court, for record. It is, therefore, now adjudged that all the right, title, and interest of the said S. W. Miller and M. J. Durham, his trustee, do now pass and vest in the First National Bank of Danville, said Chrisman is allowed $150 for making said deed to be taxed as part of the costs of this suit.

And at the same term of court, held on the 29th day of September, 1880, the following order was made:

Order giving Miller further time.

The First National Bank of Danville having become the purchaser of the lands herein, and having given S. W. Miller the right to hold the possession of the dwelling-house, garden, and out-houses until Nov. 1st, 1880, the owner of the land at that time may have a writ of possession for said land at any time after the 1st day of November if said Miller fails to give said owner possession of said house, garden, &c.

198 On the 4th November, 1880, the following affidavit was filed in the clerk's office of the Boyle circuit court:

Affidavit of death of S. W. Miller.

Affiant, John W. Miller, states that the defendant, S. W. Miller, departed this life on the 26th day of October, 1880.

JNO. W. MILLER.

Sworn to before me, by Jno. W. Miller, this 4th day of November, 1880.

J. S. CHRISMAN, *Clerk.*

STATE OF KENTUCKY, } *ss:*
Boyle Circuit Court. }

I, J. S. Chrisman, clerk of the Boyle circuit court, do certify that the above is a true and complete transcript of the records and proceedings had in my office in above case, as ordered copied by the attorney herein.

Given under my hand this 10th day of January, 1880.

J. S. CHRISMAN, *Clerk.*

Fee, $18.00.

The following is a copy of defendant's deposition in the suit of S. D. Miller, &c., *vs.* Jno. Meyer, &c., taken and filed therein:

Deposition of Geo. Denny.

199 The deposition of George Denny, Sr., taken at the law office of Anderson & Herndon, in the town of Lancaster, Ky., on the 7th day of March, 1881, to be read as evidence in behalf of the defendants in action pending in the Boyle circuit court, wherein S. D. Miller, &c., are plaintiffs, and John Meyer, &c., are defendants.

Witness of lawful age, and first duly sworn, deposes and says, as follows:

By attorney for the National Bank Lancaster, 1st Ques. What connection, if any, have you with the National Bank of Lancaster, Ky?

Ans. I am President of said bank; I have been president of same for the last 8 or 10 years.

By same, 2d Ques. State whether or not said bank holds the paper of John W. Miller and S. W. Miller for any amount; if so, state same, give the date of and copy thereof?

Ans. Said bank holds a note upon Jno. W. Miller, with Samuel W. Miller as surety for the sum of $11,626.97, dated the 18th day of July, 1878, and due in six months; a copy of same, marked "A," is herewith filed, and made part of this deposition.

By same, 3d Ques. State whether or not you attended the sale of S. W. Miller's land made by M. J. Durham on the 7th day of August, 1880; if so, in what capacity, for what purpose;
200 please detail your action in regard thereto?

Ans. I attended the sale made by Judge Durham in capacity of president of the bank, and for the purpose of looking after the interest of said bank, and whilst there I bid upon said land, and was the next highest bidder on said land, the first National Bank of Danville being the last bidder. Whilst S. W. Miller was not a debtor of the N. B. of L., yet, in the event that his property failed to pay off his indebtedness, then J. W. Miller, his surety, would be liable for the remainder of said debt; J. W. Miller has made an arrangement with his creditors by transferring to them a certain amonnt of property, which would not pay his direct creditors; hence a failure of S. W. Miller's property to pay off his indebtedness would make the N. B. of Lancaster directly interested in the sale of his property; therefore, I attended the sale for the purpose of protecting the interest of said bank.

Plaintiffs, on original petition, and defendants to the court claim, except to so much of the above answer as succeeds the 6th line, because the same is incompetent and irrelevant, and not responsive to the question.

201 BRADLEY, HOPPER, *Attorneys.*

By same, 4th Ques. What steps, if any, were taken by the National Bank of Lancaster in regard to said sale prior to the confirmation thereof by the Boyle circuit court, and why did she take any steps at all?

Ans. When I returned from said sale, I made a statement to the board of directors, which had been called for the purpose of consulting about the sale of said land. I reported to them, that said land had been sold, and purchased by the First National Bank of Danville, that it had failed to satisfy the claim *vs.* said Miller, that the First National Bank of Danville had filed the 3,500 dollars claim *vs.* the trust fund of J. W. Miller, that there were informalities about said sale, and if the said sale could be set aside, and asked them what I should do about it. Upon consideration they advised and instructed me, together with Mr. Anderson, our attorney, to take such steps as we might see proper to set said sale aside. We went to Danville, filed a petition in the Boyle circuit court, in care of S. W. Miller's trustee *vs.* S. W. Miller and others, in the meantime consulting with the National
202 Bank of Danville. We entered into negotiations with them, and finally succeeded in purchasing the land of them.

Plaintiffs on original petition, and defendants to the counter claim, except to so much of the above answer as speaks of the actions of the board of directors of the National Bank of Lancaster and the First National Bank of Danville, and the filing a petition to be made a party in the suit of S. W. Miller, trustee, *vs.* S. W. Miller and others, because written minutes of said banks and the records of the Boyle circuit court are the best evidence, and neither they, nor copies thereof, are produced.

BRADLEY, HOPPER.

By same, 5th Ques. I will ask you, upon reflection, to state whether your bank filed the petition in the Boyle circuit court, to be made a party in the suit of Miller's trustee *vs.* his creditors, or whether it was merely contemplated, and was not filed because of the adjustment of matters between the two banks?

Ans. My recollection is that it was filed, but not pressed on account of the arrangements made with the First National Bank of Danville.

By same, 6th Ques. Will you please refer to and make part of your deposition the master's report of claim filed in the
203 suit of Miller's trustee vs. his creditors, and state whether or not one of the two claims, No. 7, to wit, the $3,575.26 is the same referred to by you in the preceding part of your deposition as the $3,500 claim of the First National Bank of Danville against S. W. Miller, Thomas Anderson, John W. Miller?

Ans. I refer to the master commissioner's report, and state

that the $3,575 claim mentioned in said report, is the same claim mentioned by me above. I make said report a part of my deposition, or an official copy of it.

By same, 7. What is the amount of the two claims reported as No. 7, in favor of the First National Bank of Danville and S. W. Miller's estate, as shown by said report?

Ans. 9,288.28 dollars.

By same, 8. Will you please refer to and make part of your deposition, the report of disbursements (or an official copy) of M. J. Durham, trustee of S. W. Miller, and state how much as appears therefrom, was realized by the First National Bank of Danville on the two claim No. 7, in master's report?

Ans. I refer to said report, and make it a part of my deposition, said bank and realize on said claims $6,642.12 dollars.

204 By same, 9. State whether or not said bank had filed the claim $3,575.26 with James A. Beazley.

Ans. It had.

By same, 10. Why so filed with Beazley?

Ans. James A. Beazley is trustee J. W. Miller, and said claim was filed with him vs. the trust fund in his hands of J. W. Miller.

Plaintiffs and defendants to counter claim except to so much of said answer as speaks of a trustee of John W. Miller, because there is no evidence of a trust made by said Miller, and the record is the best evidence.

BRADLEY & HOPPER, *Attorneys.*

By same, 11. State whether or not James A. Beazley has in his hands any of the trust funds of John W. Miller, and if so, how and by what means did he become possessed of it, or obtained any control over it.

Ans. He has the whole of the trust fund of J. W. Miller in his hands, except that portion for which he has paid out for preferred claims. He came into possession of it by virtue of being appointed trustee for said J. W. Miller.

Plaintiff and defendants to counter claim, except to foregoing question and answer for same reasons as the answer next preceding.

BRADLEY & HOPPER.

205 By same, 12. For what purpose was the land purchased by your bank from the First National Bank, please give in detail the circumstances of the purchase, that is, how each was situated toward the funds of either S. W. Miller or Jno. W. Miller?

Ans. The land was purchased for the sole purpose of reducing the loss to our bank of the J. W. Miller debt, the First National

Bank of Danville had purchased the lands as specified above and it had failed to satisfy their debts, we went to them and said to them if you will withdraw your $3,575 claim from a file we will withdraw all opposition to the confirmation of sale; they refused to do it, leaving our bank liable for the *pro rata* upon said debt; we then proposed to them that if they would deduct 500 dollars from their debt and transfer it to us, and the $3,575 claim, we would take the lands. They accepted of our proposition, and the trade was made and set forth by a proper draw up is referred to here and made a part hereof. (Paper A, B. C.)

By same, 13. How did that trade benefit your bond and reduce your loss on your debt *vs.* Jno. W. Miller's?

206 Ans. The *pro rata* of the $3,575 debt in our bond allowing J. W. Miller's property to pay 40 cents would be somewhere from 12 to 1,300 dollars, we were at liberty to file that claim and take it out the trust fund, hereby increasing the ability of J. W. Miller's fund to pay off his indebtedness, we were to pay back to them some 400 dollars, provided the claim was filed and the bank transferred to us the remainder of her debt on S. W. Miller, some 500 dollars, our debt, or rather the loss in J. W. Miller's debt to us, would be reduced some $1,200.

By same, 14. To refresh your recollection, was not your bank to only pay back to the First National Bank [of] Danville, out of her *pro rata* she might receive from the Jno. W. Miller trust fund an amount equal to the amount that said bank would have received on her two debts of $2,500 each against Jno. W. Miller and S. W. Miller, provided said $3,575 debt had not been produced against Jno. W. Miller's estate, which would amount to not more than $125, or thereabouts, instead of $400?

Ans. The contract is set forth in the paper heretofore mentioned, and the bank was to pay back equal to the amount

207 that said bank would here received upon her two debts of $2,500 each, provided said 3,575 debt has not been *pro rata* on the trust fund of J. W. Miller's estate, which amount I cannot exactly state, from the fact that the amount of J. W. Miller's indebtedness and his assets have not been before me, I only endeavored to approximate, and cannot say that your proposition or mine either is exactly correct.

Questions 13 and 14 and answers thereto, excepted to because they are incompetent and irrelevant.

BRADLEY & HOPPER.

By same, 15. Was the land bought by your bank for speculation, or as a permanent investment? What steps, if any, had been taken by you to resell the land up to S. W. Miller's death?

Ans. The land was purchased by our bank simply for the purpose of reducing our loss upon the J. W. Miller debt; had it not

been for that debt the bank would not have considered the proposition at all. We had sold a portion of the land before the institution of this suit, and would have sold the whole of it as soon as we could have found purchasers.

Foregoing question and answer excepted to because incompetent and irrelevant.

BRADLEY & HOPPER.

208 By same, 16. What is the fair market value of the land?

Ans. I think the land is worth what we gave for it, and perhaps could be sold for thirty dollars per acre.

By same, 17. Had you made any effort to sell it prior to S. W. Miller's death, in October, 1880?

Ans. Yes.

By same, 18? What effort, what success?

Ans. I met Mr. Pruitt in the place prior the death of S. W. Miller and priced it to him, but he failed to accept of the terms. I cannot now state whether I sold the land to Pence prior to the death of Mr. Miller or not. It may have been prior to his death, but am inclined to think it was a short time after his death I priced it to him, and he made me an offer, which I afterwards accepted; but in the meantime this litigation was instituted, and he could not get possession.

By same, 19. Did you have possession of any of said land prior to S. W. Miller's death? If so, how much, and what portion of it?

Ans. I understood from Judge Durham that we were put in possession of the land at the time the deed was made. I certainly considered that we were in possession, and for that pur-
209 pose went to the place to sell it to Mr. Pruitt. Old man Miller himself showed us the different boundaries, and assisted me so far as he could to sell it to him. I refused to rent it to some parties, stating as a reason that I wanted the grass to grow. I mean all the lands except that portion that had been rented by the two Miller boys and the part held by old man Miller.

Foregoing questions and answers excepted to because it is incompetent and irrelevant.

BRADLEY & HOPPER.

By same, 20. Where did S. W. Miller die, and what was his age?

Ans. He died on the 26th of October, 1880, and he was about eighty-two years of age.

By same, 21. What will Jno. W. Miller's estate pay to the dollar?

Ans. I cannot say exactly; the liabilities and assets have never been succinctly stated; I think somewhere between 35 and 45 cents.

Foregoing question and answer excepted to because it is incompetent and irrelevant.

BRADLEY & HOPPER.

By same, 22. What does your bank purpose doing with the land; is it for sale or not?

Ans. As soon as we get possession it is our purpose to
210 sell as soon as we can get a purchaser.

Cross-examined:

Ques. 1. You state, in answer to question 2, on direct examination, that your bank holds a note on Jno. W. Miller and S. W. Miller for $11,626.97, dated the 18th July, 1878, and due at six months. Please state whether or not the debt was created on the date of the note, or was it a renewal of older debts?

Ans. My impression is that it was a renewal.

2. How long prior to the date of the note had the debt been in existence?

Ans. I cannot state. Mr. Kinnaird, the cashier, attended to renewals and discounts.

3. Will you approximate it as nearly as you can?

Ans. I cannot state; have no correct idea.

4. Had it been several years?

Ans. I think a part of it had been for several years.

5. When did you first find out that S. W. Miller had made a deed of trust, and that suit was pending in the Boyle circuit court to settle the trust?

Ans. I could not tell, but I suppose in a short time after the suit was brought.

211 6. Did you file your claim in that suit against said S. W. Miller?

Ans. I think not.

7. Why did you not file it?

Ans. Because we were satisfied that it would be cost without any benefit.

8. Please answer the above question without evasion?

Ans. Because we were satisfied that there would not be sufficient amounts of funds to pay off the indebtedness, and the Bank of Danville had the priority over us.

9. Is it not a fact that prior to the making of the deed of trust by S. W. Miller you had, on the 21st day of Jan'y, 1879, released and discharged said S. W. Miller from liability on said debt?

Ans. We had; but this $3,575 debt is a debt of F. N. B. of Danville, which had not released S. W. Miller, and purchased by us after the release spoken of.

10. Do you mean to say that the debt of $11,626.97, dated July 18th, 1878, due at six months, and about which I have been asking you, is a debt of the First National Bank of Danville?

Ans. I do not.

11. Then, if I now understand it correctly, you, (the
212 National Bank of Lancaster,) at the time of the sale made by Durham of S. W. Miller's land, had no debt against S. W. Miller?

Ans. I have so stated.

12. Had you not, also, on said 21st of Jan'y, 1879, released Jno. W. Miller?

Ans. We had.

13. You say, in answer to the 4th question on direct examination, that after the sale by Durham you reported to the bank that there were informalities in the sale—such as that it could be set aside; please state what the informalities were?

Ans. That Durham had failed to have the land appraised before the sale.

14. Was that the only informality upon which you propose to base your motion to set aside the sale?

Ans. That is all that I can now recall.

15. You say, also, that the bank instructed you, together with your attorney, Mr. Anderson, to take such steps as you might deem necessary to set aside the sale; was that instruction made in writing and entered upon your minute-book?

Ans. It was not.

213 16. Who, then, gave you the instruction, and how was it done; was there a meeting of your board of directors?

Ans. I have stated that the board of directors had been called, and I restate the fact that they gave me the instruction.

17. Was the board all together, and organized as a board, or did you get their individual assent separately?

Ans. The board was called together as a board in this room of Mr. Anderson, and the whole question was discussed and the authority given by that board.

18. Have you, under your by-laws, a fixed place for the meeting of your board?

Ans. I cannot say; and if such was the fact, it would have no legal force.

19. Will you please state when you received your license to practice law?

In this celebrated case in which you are employed now.

The foregoing question and answer excepted to, because irrelevant and incompetent.

ANDERSON, &c., *Attorney.*

20. Has your bank a code of laws?

Ans. I believe it has.

Excepted to because incompetent and irrelevant.

ANDERSON, &c.

21. Will you file a copy of your by-laws as part of your deposition.

214 Ans. I don't think I will.

Excepted to as incompetent and irrelevant.

ANDERSON, &c.

22. Why not?

Ans. As I have been practicing law in this case, I don't think it is legal.

Excepted to for same reasons given above.

23. You say that you and Mr. Anderson, after consulting with the National Bank of Danville, entered into negotiations with them, and finally succeeded in purchasing the land from them. Please state on what authority you and Mr. Anderson acted in behalf of the National Bank of Lancaster in making the purchase.

Ans. I have already stated that we acted under and by the authority of the board of directors of N. B. of Lancaster, Ky.

24. Was the authority to you and Mr. Anderson to make the purchase entered upon the minutes of your proceedings as a bank?

Ans. It was not.

25. Does your bank or board of directors keep a record of their proceedings?

Ans. They do; but this board was called after the bank had been closed, and the transaction was never placed in the book.

215 26. Has any minute ever been made in your proceedings of anything connected with the purchase of the S. W. Miller land.

Ans. I could not now state, but my recollection is that there has not.

27. At the time you purchased the land did you not also purchase the $3,575.26 note, and also a note on S. W. Miller for $5,551.75 from the First National Bank of Danville?

Ans. I have stated that the remainder of the $3,575.75 was transferred to us; also the remainder of the $5,571, after deducting the trust fund of S. W. Miller.

28. Have you ever received any *pro rata* from the estate of S. W. Miller on the $5,551.75 debt?

Ans. We have never received anything from S. W. Miller or his estate.

29. You speak in direct examination of Jos. A. Beazley, trustee of Jno. W. Miller, and of Jno. W. Miller's trust estate. When you make such references do you not refer solely to the agreement dated January 21, 1879, on file herein, between Jno. W. Miller and other parties, and the rights of said parties growing out of said paper?

Ans. I do.

30. You speak of having sold the land, or portions thereof. Was there ever any writing drawn and signed between the bank and such persons as you say have purchased?

216 Ans. There were not. I priced the land to a Mr. Pence, of Lincoln county, at a certain price. He did not accept, but left a bid with me for said land. I accepted afterward his bid by letter. He returned and brought his wife with him to look at the land and to have the sale confirmed, as I understood, and was notified that the land was in possession of J. W. Miller.

31. You say that you understood from Durham that you were put in possession, and that you considered yourself in possession of part of the land; please define what portions of the land you considered yourself in possession of.

Ans. All the land except that portion in possession of the two Miller boys, aggregating about 160 acres, and the house and lot and garden where Mrs. Miller now resides, and the same residence at which the old man died.

32. Was there any meeting of your board of directors in which you were directed to take possession of the land or sell it?

Ans. There was none; but the authority invested in me by the board was summary and granted to me such power as was necessary to purchase, sell, and convey.

217 33. As none of your proceedings were committed to writing, will you please state just what occurred at the board meeting in reference to this matter?

Ans. I have already stated the purpose for which the board was called together. After deliberating upon the whole matter, in order to reduce our loss upon the J. W. Miller debt, stating to the board my reasons for wanting the sale set aside, they agreed and authorized Mr. Anderson and myself to take such steps as we deemed necessary—in fact, gave us plenary power to do what we though best in the whole matter.

34. Was that the only meeting you ever had in reference to this matter?

Ans. That was the only meeting called for that purpose. At our regular meeting the whole question has been discussed.

35. At the regular meetings were your proceedings entered of record?

Ans. Yes; but we frequently discuss questions which we do not enter of record.

36. Was anything connected with this matter entered of record at the meetings at which the matter was discussed?

Ans. I do not now recollect, but think not.

218 37. Will you please examine your minute book and see?

Ans. My best impression is that there is not.

38. In answer to question 15, on direct examination, you say the land was purchased by your bank simply for the purpose of reducing your loss upon the J. W. Miller debt. Was not the J. W. Miller debt referred to in that answer the $11,626.99 note herein before referred to?

Ans. Yes.

Re-examined:

Your attention is called to question and answer No. 27, in cross-examination. I will ask you in regard thereto whether or not it was agreed between your bank and the First National Bank of Danville that the whole of $3,575 debt was to be *pro rated* unto the trust fund of J. W. Miller to the extent that it might be necessary to pay the balance of it in the same name, that the latter bank would have had the right to present it and collect the balance against J. W. Miller's trust estate?

Ans. It was.

Foregoing question and answer excepted to because it is incompetent and irrelevant. BRADLEY & HOPPER.

Re-examined:

Was or is Jno. W. Miller liable on the $5,551 debt?

219 Ans. He is not. GEO. DENNY.

Deposition of A. R. Denny.

Also the deposition of A. R. Denny, taken at the same time and place and for the same purpose. Witness of lawful age, and first duly sworn, deposes and says:

By attorney for National Bank of Lancaster, Ky., 1. What connection, if any, have you with the National Bank of Lancaster, Kentucky?

Ans. A director, and have been for two years.

By same, 2. For what purpose was the land purchased by the National Bank of Lancaster, Ky., from the First National Bank of Danville in controversy herein? Was it for speculation, or as a permanent investment for a re-sale?

Ans. It was purchased in order to reduce the loss of the National Bank of Lancaster, Ky., on the debt owing said bank by John W. Miller, and not for a permanent investment, nor for speculation.

Question 2 and answer objected to, because it is incompetent and irrelevant. BRADLEY & HOPPER.

By same, 3. How do you know for what purpose purchase was made? Were you present at any meeting of the board of said bank held in regard to the purchase?

Ans. I was present in the law office of Anderson & Herndon at a called meeting of the board of directors of the Na-
220 tional Bank of Lancaster, Ky., and heard all the matter discussed, and know by personal participation in the proceedings of said meeting, which was held on Saturday preceding the September term of the Boyle circuit court, 1880, which is the same meeting referred to by George Denny in his desposition preceding.

Cross-examined:

Ques. 1. Do you concur with Mr. George Denny that none of your proceedings with reference to the Miller land were entered upon the minutes?

Ans. I have not examined the minutes, and cannot state positively whether there is any reference to the purchase of S. W. Miller's lands, but do not think there is.

2. At the meeting referred to by you in this office in September, 1880, state the instructions you gave the president and Mr. Anderson, your attorney, in reference to said land.

Ans. They were instructed to act for the best interest of the National Bank of Lancaster, Ky.

3. In answer to question 2 on direct examination you say that the purpose in purchasing the S. W. Miller land was to reduce the loss of the National Bank of Lancaster, Ky., on the debt owing said bank by John W. Miller; please explain what debt John W. Miller owed that bank and how the loss on that
221 debt was to be reduced by the purchase.

Ans. The debt owing the National Bank of Lancaster, Ky., by John W. Miller is for $11,626.27, due six months after date, which is July 18, 1878, and the debt was to be reduced by the purchase of the claims against S. W. Miller, thus entitling the bank the *pro rata* in John W. Miller's estate which the creditors of S. W. Miller would have been entitled to.

4. Had not both John W. Miller and S. W. Miller been released from the $11,626.27 debt long prior to the purchase by your bank of the S. W. Miller land?

Ans. An agreement between the bank and John W. Miller had been entered into releasing John W. Miller and S. W. Miller under certain conditions I cannot now state, not having read the agreement, but not in any event binding said bank from taking any action that would prevent them from suffering loss in the settlement of J. W. Miller's estate under the agreement.

5. Then the release was not unconditional?

Ans. As I stated before, I have not read the agreement, and

only know in general terms its contents from discussions in the meetings of the board on the subject.

222 6. Then you will not undertake to say whether the release is absolute and unconditional or not?

Ans. For reasons stated above I will not.

7. I now present you a copy of said release on file as an exhibit in this case to which your name appears to be signed as director; is not the debt mentioned in said paper as due by John W. Miller and S. W. Miller to the National Bank of Lancaster the same debt as that referred to by you in the first part of your deposition?

Ans. I suppose it is.

8. At the meeting of the board of directors in this office in September, 1880, at which the president of the banks and the attorney, Mr. James A. Anderson, were authorized to purchase the Miller land, was it not understood and expected that you could sell the land for more than you would have to pay the Danville Bank for it?

Ans. We hoped that it might be sold for more, but we would by no means have purchased the land but for the hope of reducing the bank losses; that was the primary consideration.

9. Who advised you that you could reduce the loss on the J. W. Miller debt by buying the S. W. Miller land?

223 Ans. Our attorney, J. A. Anderson.

10. Was he present at the meeting of the board?

Ans. He was. A. R. DENNY.

The taking of depositions in the case is adjourned until Wednesday, March 9, 1881. WM. McKEE DUNCAN, *Ex. G. C.*

1881, Wednesday, March 9. Met pursuant to agreement.
WM. McKEE DUNCAN, *Ex. G. C.*

Also the deposition of George W. Dunlap, taken at the same place and for the same purpose, on the 9th day of March, 1881. Witness of a lawful age, and first duly sworn, deposes and says:

By attorney for National Bank of Lancaster, Ky., 1. What is your avocation or profession?

Ans. I am an attorney-at-law.

By same, 2. Do you know who is the attorney of Joseph A. Beazley, the agent, attorney-in-fact, and trustee appointed by the deed of agreement between John W. Miller and his creditors of date 21st January, 1879; if so, state who?

Ans. My father and I were partners, doing business under the firm-name of Dunlap & Dunlap, and represented Mr. Beazley as trustee and agent of John W. Miller. After the death of my father I have represented him as surviving partner.

224 By same, 3. State, if you know, what the trust assets in the hands and under the control of said Beazley will pay to the dollar, or whether it will pay dollar for dollar?

Ans. We have made no accurate estimate of the assets and liabilities of John W. Miller, and, from what information we can get of the same, the trust will not pay dollar for dollar, and from the general estimate we have made somewhere in the neighborhood of forty cents.

By same, 4. State whether or not the First National Bank of Danville ever filed any claims with said Beazley against S. W. Miller and John W. Miller; if so, give any knowledge you have in regard therero.

Ans. The first information I had of the filing of any claims by the First National Bank of Danville against said trust arose in this way: Mr. Beazley came to my office to know if any claims had been filed before me, I having advertised for same as his attorney, and I told him none had been filed before me, and we then went over to the National Bank of Lancaster, Ky., and obtained from Mr. Kinnaird, the cashier of that bank, three claims against John W. Miller's trust in favor of the First National Bank at Danville that had been left with him. Two of
225 them were for $2,500 each, and the third for $3,500. I took possession of said claims and brought them to my office, and filed them and put them in an envelope endorsed "Claims against John W. Miller." Not a great while after that Mr. Ad. Cheek, an officer of the First National Bank of Danville, came to my office to see whether or not the claims of the bank he represented had been filed. I got the claims, and we looked over them, and all three of them were properly proven. He returned them to me, and I put them back in my desk. The $3,500 claim referred to is not now in my possession. I have either lost or misplaced it, and have not seen it since the day Mr. Cheek was in my office. I will state further that there was a paper attached to the $3,500 claim by the terms of which Mr. Randell Betts was released from liability as security in same and John W. Miller substituted for him; that was the substance of the paper. The full contents I do not now recollect. This agreement I refer to was pasted to the $3,500 note, and it is lost with the rest.

By same, 5. State whether or not you ever filed a petition to be made a party, and praying that it be taken as your
226 answer in the suit of S. W. Miller, trustee, against his creditors in the Boyle circuit court; if so, you please refer to it as part hereof, give the date of filing, and state the object and purpose thereof.

Ans. I did file such a paper as indicated in the question, and the same is endorsed by J. S. Chrisman, clerk, "filed September

20, 1880." The object of the filing of the paper was to set aside the sale of the land of S. W. Miller, it not having been appraised before the sale according to law. We, the trustee and I, did not think the land brought its full value, when bought by the First National Bank of Danville, and took this method of having the sale set aside in order to throw the land on the market again; it was done with the view to make the land bring enough to pay off the $3,500 debt referred to, and thereby relieve Jno. W. Miller's trust from the payment of same, and, after the paper was filed, by some arrangement between the First National Bank of Danville and the National Bank of Lancaster, it was agreed that no further resistance to said sale should be made on my part. I do not know the terms on which it was adjusted. I was
227 not a party to it. I refer to my answer above mentioned, and make the same a part of deposition. I will further state that Mr. George Denny, president of the National Bank of Lancaster, and Mr. James A. Anderson, attorney for said bank consulted with me about the filing of the aforesaid paper, and my action was taken for the benefit of Jno. W. Miller's trust.

The attorney for the plaintiff and defendants to the counterclaim except to the last statement of the witness.

BRADLEY & HOPPER.

Cross-examined:

Ques. 1. The petition to be made a party, filed by you on the 20th September, 1880, appears to be based upon a note of S. W. Miller, dated October 7, 1877, for $109.33; why was not that note filed with the commissioner sooner?

Answer. There was an agreement made between Mr. S. W. Miller and my father in my presence last spring, by the terms of which my father agreed to take 120 or 125 cedar posts (I forget the exact number) in full payment of this debt. Mr. Miller delivered 97 of said posts in his life-time, and at the time of the filing of this petition and answer the remainder of the posts had not been delivered. The note was not to be given up to Mr. Miller until the contract had been fully complied with
228 by the delivery of all the posts. At the time of the filing of the answer, the debt was not paid, and I took advantage of the claim to benefit Jno. W. Miller's trust, as stated above, and with the further hope of making something for my father's estate, the posts not paying more than about 35 cents to the dollar of said debt. Since the filing of the answer the rest of the posts have been delivered, and I have given a paper to Mr. Jno. W. Miller acknowledging full satisfaction of the debt.

2d. In answer to question five on direct examination, you say that the object of the filing of the paper on the 20th September,

1880, was to set aside the sale of the land of S. W. Miller, and that your action was taken for the benefit of Jno. W. Miller's trust, yet that by some arrangement not understood by you, between the First National Bank of Danville and the National Bank of Lancaster, it was agreed that no further resistance to said sale should be made on your part; please explain this.

Ans. As stated above, the object of taking the action and filing the paper referred to was to save the trust of Jno. W. Miller
229 from the payment of the $5,500 debt. My understanding from the parties making the agreement between the two banks was that point had been accomplished. I have understood lately, from other sources, that the National Bank of Lancaster is to get the benefit of the *pro rata* on the $3,500 debt. I did not so understand it at the time. The National Bank of Lancaster was the largest creditor of Jno. W. Miller; that is the reason I consulted with the president and attorney in reference to the filing of the paper, they being the parties interested to the greatest extent in having Jno. W. Miller's trust estate pay the largest *pro rata*.

3d. At the time you withdrew opposition to the confirmation of the sale, was it your understanding from the National Bank of Lancaster and the First National Bank of Danville that, by the arrangement between them, the thirty-five hundred dollar debt was not to be presented against Jno. W. Miller, and was it under that representation that you withdrew opposition to the confirmation of the sale?

Ans. There was no particular understanding or contract between me and the two banks, it was my understanding from what was reported to me that the $3,500 debt was not to come
230 against the trust of Jno. W. Miller. As stated above, the National Bank of Lancaster was the largest creditor of Jno. W. Miller, and the object of filing the paper was to have a resale and make the land bring enough money to pay off the $3,500 debt. My understanding from Mr. Anderson & Denny was that our object had been substantially accomplished by the contract they had made; the $3,500 was not specifically named by any of us at that time. I then withdrew my opposition to the confirmation of the sale. I will further state that it was my understanding that the National Bank of Lancaster was to get the land of S. W. Miller, and I considered the land worth enough more than what it brought at said sale to cover the $3,500 debt.

4. What relation did Messrs. Anderson & Denny, mentioned in foregoing answer, sustain to the National Bank of Lancaster?

Ans. As stated above Mr. Geo. Denny is president and Mr. James Anderson is attorney for the National Bank of Lancaster, and was such at the time indicated in the question.

5. In speaking, on direct examination, of Jno. W. Miller's

trustee and Jno. W. Miller's trust estate, do you not refer
231 solely to the agreement made between Jno. W. Miller and others of date 21st January, 1879, on file herein, and the rights of the parties growing out of said agreement?

Ans. I do.

GEO. W. DUNLAP.

STATE OF KENTUCKY, }
Garrard County. }

I, William McKee Duncan, examiner of Garrard county, certify that the foregoing deposition of George Denny, Sr., A. R. Denny, and G. W. Dunlap were taken before me at the time and place in the captions; that said witnesses were duly sworn before giving it; that the deposition of Geo. Denny, Sr., and A. R. Denny were written and subscribed by them in my presence, and deposition of Geo. W. Dunlap was written by me in his presence and read to and subscribed by him in my presence; plaintiff and defendant was prhsent in person, and by attorney at the examination.

Given under my hand, this 9th day of March, 1881.

WM. McKEE DUNCAN,
Examiner, Garrard County.

Boyle Circuit Court.

S. D. MILLER, Plaintiff,
vs
JOHN M. MYER, &c., Defendants. } Deposition of Defendants.

232 *Deposition of J. A. Cheek for defendants.*

The deposition of J. A. Cheek, taken on the 15th day of March, 1881, by agreement of parties at the law office of Durham and Jacobs, in the town of Danville, Kentucky, to be read as evidence on behalf of defendants in an action now pending in the Boyle circuit court between S. W. Miller, &c., plaintiffs, and J. M. Myer, &c., defendants. Witness of lawful age and first duly sworn, says:

On written interrogations by defendant, National Bank of Lancaster:

What office, if any, do you hold in the First National Bank of Danville; and if you say you hold an office in said bank, state how long you have held said office?

Ans. I am teller and assistant cashier of the First National Bank of Danville, Kentucky, and here held that office some three years or more, and previous to that time I was employed as clerk in that bank since March, 1872.

No. 2. Were you acquainted with S. W. Miller deceased, and

are you acquainted with defendant Jno. W. Miller, and if you know, state what relationship existed between them?

I was acquainted with S. W. Miller deceased, and also known Jno. W. Miller; S. W. Miller was Jno. W. Miller's father.

233 No. 3. State whether or not the First National Bank of Danville ever held any claims or obligations on defendant, Jno. W. Miller, as surety or endorser of said S. W. Miller; and, if yes, state what the claims were, and what steps, if any, had ever been taken by said bank to collect said claims from said John W. Miller, or estate of said John W. Miller, assigned or surrendered to his creditors.

Ans. The bank held a note for about $3,575.26, given by S. W. Miller, Thomas Anderson, R. H. Bettis, on which Bettis was surety; as I understand it, a suit was instituted on this note, and, owing to some claims which Bettis threatened to set up, Jno. W. Miller executed a paper to said bank agreeing to take the place of R. H. Bettis as surety on this note. This original paper was filed with Mr. Beazley, trustee and agent of J. W. Miller, as the basis of our claim on this debt against the estate of J. W. Miller; this was done some months prior to the sale of S. W. Miller's land, which occurred some time last summer, (1880.)

4. What part of said claim was asserted and presented by said bank against the Jno. W. Miller estate in the hands of Beazley?

234 Ans. The whole claim was asserted and presented against John W. Miller's estate.

5. State whether or not you were in any way concerned for said bank in the negotiation which resulted in the sale and conveyance to the National Bank of Lancaster of the S. W. Miller tract of land; and, if yes, what did you have to do with the negotiations?

Ans. I was one of a committee appointed to meet the committee of the National Bank of Lancaster, and was present when the negotiations between us were concluded and the sale made.

6. State what the trade was.

Ans. We were to deed to the National Bank of Lancaster, Kentucky, the land purchased by us at the sale of S. W. Miller's land, made by M. J. Durham, trustee of S. W. Miller (less a small portion of the land which we deeded to S. W. Miller), on the payment to us by the National Bank of Lancaster of the purchase money, and the remainder of two debts which we held against S. W. Miller and others, principal, interest, and costs, less $500, with an agreement made by us in reference to the debt of

235 $3,575.26, before referred to, and which had been already filed against J. W. Miller's estate. One of the debts to be transferred was this $3,575.26, and the other was for about $5,550. We were to deed the land, only passing to them such title as had

been invested in us by the court, and the debts were to be assigned without recourse on us.

Plaintiffs and defendants to the counter claim except to the foregoing question and answer, because the record is the best evidence, and the question and answer are otherwise incompetent and irrelevant. BRADLEY & HOPPER, *Att'ys.*

7. Does the First National Bank of Danville still hold the claim of $3,575.26 on Jno. W. Miller, of which you speak?

Ans. He does not now hold this debt.

8. What became of your right to the claim?

Ans. We transferred all our right to the claim to the National Bank of Lancaster, without recourse on us.

9. Who do you mean by "we" and "us"?

Ans. The First National Bank of Danville.

10. Was the contract by which the First National Bank of Danville assigned its right to said claim to the National Bank
236 of Lancaster in any way connected with the contract of sale by the First National Bank of Danville to the National Bank of Lancaster of the "Miller land"?

Ans. It was all one trade and contract.

Foregoing question and answer excepted to because incompetent and irrelevant. BRADLEY & HOPPER, *Att'ys.*

11. Who represent the First National Bank and who represent the National Bank of Lancaster in the negotiations?

Ans. The committee on behalf of the First National Bank of Danville, appointed by the board of directors, were M. J. Farris, Samuel Harding, J. A. Quisenberry, and myself, but I don't think Mr. Harding was present when the contract was made, although a portion of the contract in regard to the $3,575.26 was reduced to writing by Mr. Harding. As I now remember, Mr. Geo. Denny, Sr., Mr. Jas. A. Anderson, and J. H. Bruce were the representatives of the National Bank of Lancaster who met us.

No. 12. Who keep the minutes of the actions of board of directors of the First National Bank of Danville?

Ans. J. A. Quisenberry, cashier of the bank.

237 No. 15. Was your contract with the National Bank of Lancaster—I mean the whole of the time and trade—at the time of the making of the contract reduced to writing?

Ans. It was not.

No. 14. What was the consideration to be paid by the National Bank of Lancaster, and state whether or not it has been paid?

Ans. The amount paid by the National Bank of Lancaster was $13,945.59, thirteen thousand nine hundred and forty-five and $\frac{95}{100}$ dollars, which has been paid.

15. Were the said negotiations and contract between said banks before or after the conveyance of the Miller land to the First National Bank by the *court* of the court?

Ans. The negotiations and contract were made before the deed was made us by the court.

Cross-examined by W. D. Hopper, attorney for plaintiff:

1st. How long before the date of deed was the contract with the bank referred to in preceding question?

Ans. The contract and agreement between the committees of the two banks was (as near as I recollect) made, and the last conference of which the contract and agreement made, was held on Sept. 23d, 1880.

2. When was the money paid?

238 Ans. On Sept. 24, 1880, we charged to the account of the National Bank of Lancaster, with us, $14,428.99, and credited to them the amount agreed to be deducted from the debts assigned to them; on the next day, 25th, wrote them that the above charge and credit was made against their accounts; we also stated that we had found costs to the amount of $16.60, which they were to pay. These costs, $16.60, were charged to their account, Oct. 4th, 1880. The above debits to their account, less the $500 credited, made the amount of consideration paid us $13,945.59.

Ques. 3. Was the contract and agreement between the First National Bank of Danville and the National Bank of Lancaster ever reduced to writing?

Ans. No; but the agreement in regard to the debt of $3,575.26 was reduced to writing.

Ques. 4. Has the residue of the agreement never been reduced to writing?

Ans. The residue of the agreement has never been reduced to writing.

Ques. 5. Please state what portion of the contract or agreement has never been reduced to writing?

239 Ans. Reference is made to my answer to question 6 on direct examination. The agreement referred to in regard to the $3,575.26 debt was the only part of the agreement reduced to writing.

Ques. 6. Please examine exhibits A, B, C, and the deed from the First National Bank of Danville to the National Bank of Danville, now presented to you, and state whether or not these papers contain the whole of the agreement between the two banks?

Ans. Reference is again made to the answer to question 6, on the direct examination, for my understanding of the agreement and contract made, and the papers shown me were all executed

for the purpose of carrying out that contract and agreement. The papers shown me embrace all of the contract except the part in reference to deducting the $500 from the amount of the debts, principal, interest, and costs, which had been incurred.

Ques. 7. What were the two debts from which the five hundred dollars was deducted?

Ans. One was a debt for $5,551.75, and the other was a
240 debt, referred to before in this deposition, of $3,575.26.

Ques. 8. Is the $5,551.75 debt referred to in above answer the same referred to in exhibit C?

Ans. Yes.

Ques. 9. Had not both of said debts been sued upon by your bank, and about 71 on the dollar realized by your bank thereon prior to your agreement hereinbefore referred to
241 with the National Bank of Lancaster?

Ans. The debts had been sued on, but we had not realized the *pro rata* of about 71 per cent. from S. W. Miller's estate before we made the agreement with the National Bank of Lancaster.

Ques. 10. Have you, at any time, realized any amount on said debts?

Ans. We realized the *pro rata* of about 71 per cent. from M. J. Durham, trustee of S. W. Miller.

Ques. 11. On September 24th, 1880, did you transfer to the National Bank of Lancaster the whole of said debt, or only the remainder after crediting the *pro rata* aforesaid?

Ans. We intended to transfer the remainder of said debts.

Ques. 12. After deducting the *pro rata* received as above, on 24th September, 1880, was it your purpose to sell the remainder of both said debts to the National Bank of Lancaster?

Ans. Yes; it was.

Ques. 13. How long had said debts been past due?

Ans. Both debts had been due since May 23d, 1878.

Ques. 14. It appears, by receipt on file with report of M. J. Durham, trustee for S. W. Miller, dated December 2, 1880, (in the case of S. W. Miller's trustee against S. W. Miller's creditors,) that you received from him two hundred and fifty-three dollars; state on what account that fund was received.

242 Ans. We had other debts against S. W. Miller, which did not transfer to the National Bank of Lancaster, and which were entitled to their part of the money distributed by M. J. Durham, trustee of S. W. Miller, on December 2d, 1880. As the distribution was a small one, and probably final, and the assignment of the debts had not been filed with M. J. Durham, trustee, we receipted to Durham, trustee, for the amount, $253, giving credit to the National Bank of Lancaster for their pro-

portion of the same, which was $168.83, the balance, being $84.17, belonging to us, and was retained by us.

Ques. 15. When did you pay the National Bank of Lancaster the $168.83?

Ans. It was entered on our books on December 4th, 1880. We notified the National Bank of Lancaster, and have settled our accounts with them each month since, and have agreed with them.

Ques. 16. What other debts did you assert in the case of S. W. Miller's trustee *vs.* S. W. Miller's *creditors*, which entitled you to the $84.17 retained by you?

Ans. By virtue of claim No. 9 in the report of F. T. Fox, master commissioner, filed September 20th, 1880.

Ques. 17. In addition to the *pro rata received* from M. J. Durham, was not the $5,551.76 debt entitled to the following
243 credits: $70, paid May 25th, 1879; $70.25, paid September 19th, 1879, and $1,204.96, realized out of the estate of R. H. Bettis, on September 24, 1879?

Ans. Yes.

Ques. 18. Is not the whole of the $4,630 debt, referred to by you as claim No. 9 in report of F. T. Fox, secured by lien upon a tract of land in the State of Missouri?

Ans. Don't think it is.

Ques. 19. Please state the condition of that debt in reference to the lien on the Missouri land.

Ans. We have not realized anything in the case pending in Missouri, and it remains to be seen how we will come out in that case, but hope and expect to realize something on this debt, but cannot now positively tell how much.

Ques. 20. Have not you and M. J. Durham, executor of John Miller, both levied attachments upon the Missouri lands, and have you not an agreement how the proceeds of the land are to be directed?

Ans. Refuse to answer.

Cross-examination:

244 By defendant for Bank of Lancaster:

1. Why do you refuse to answer the last question?

Ans. Because I don't see how that could possibly have anything to do with this case.

By same, 2. Did not the First National Bank of Danville prove its debt of $3,575.26 against D. W. Miller's estate in hands of Durham, trustee, and also prove and present the same claim against the estate transferred by John W. Miller to Beazley, agent and attorney for his creditors?

Ans. Yes; it did.

By same, 3. What was the claim of said bank, in reference to

its debt against both estates, to draw a *pro rata* from both estates on the whole of the debt until the debt was paid it in full, if the proceeds should be sufficient, or to only draw a *pro rata* from the John W. Miller estate, and the balance after crediting what could be gotten from S. W. Miller's estate?

Ans. It was our intention and purpose to draw dividends from both estates until our debt was paid in full, if the divi-
245 dends from both were sufficient to do so.

The foregoing and answer excepted to, because it is incompetent. BRADLEY & HOPPER.

By same, 4. Was or or was not the understanding between the persons negotiating for the two banks at the time that the First National Bank had a right to a *pro rata* on the whole of said debt from Jno. W. Miller's trust estate?

Ans. It was.

Foregoing question and answer excepted to, because incompetent. BRADLEY & HOPPER.

5. Now, was or was it not the intention to assign and transfer the whole of said claim of $3,575.26 to the National Bank of Lancaster as against Jno. W. Miller's trust estate in the hands of Beazley, and where you say in answer to question of plaintiff's that it was only the balance of the claim after deducting the dividend which might be gotten from S. W. Miller's trust estate, and are you not mistaken, and do you or do you not mean that the National Bank of Lancaster was
246 not to be entitled to the dividends which the S. W. Miller estate might pay, but to the dividend on the whole of the debt from Jno. W. Miller, until the debt was paid, if it should be sufficient?

Ans. It was our intention to put the National Bank of Lancaster in possession of just the same rights against the estate of J. W. Miller, in the hands of Beazley, trustee and agent, as we had which, as we understand, was to collect dividends from J. W. Miller's estate until our debt was paid in full, should the dividends from that estate be sufficient to do so.

Foregoing question and answer excepted to, because it is incompetent. BRADLEY & HOPPER.

6. When, in answer to question 3 in cross-examination, you say the agreement, except as to the $3,575.26, was not reduced to writing, do you or not mean contemporaneously with the
247 contract, and were not papers afterward executed to carry out the contract in accordance with it, excepting the matter you have explained?

Ans. There were no other papers contemporaneously executed,

except the one spoken of, but the others were afterward executed to carry out the contract.

8. Examine the affidavit to the claim of the First National Bank of Danville in the case of S. W. Miller's trustee *vs.* S. W. Miller's creditors, and state whether not the credits of $70 and $70.70 and $1,254.96, mentioned in question 17 of cross-examination, are not admitted and set out in the affidavit.

Ans. Yes, they are.

Re-cross-examination:

In speaking of John W. Miller's trust estate and of Jas. A. Beazley, trustee for Jno. W. Miller, do you not refer solely to the agreement between Jno. W. Miller and others, dated 21st January, 1879, and on file herein, and the rights of the parties growing out of said agreement?

Ans. Yes.

Deponent further sayeth not. J. A. CHEEK.

248 I, J. Wesley Durham, examiner for Boyle county, do certify that the foregoing deposition of J. A. Cheek was taken before me at the time and place mentioned in the caption; that it was written by said Cheek in my presence, was read to and subscribed to by him in my presence; that the witness was first duly sworn before giving his deposition.

Witness my hand, this March 10th, 1881.

J. WESLEY DURHAM,
Examiner for Boyle County.

Boyle Circuit Court.

S. W. MILLER, &c, Plaintiffs,
vs.
JNO. W. MILLER, &c, Defendants. } Affidavit.

Affidavit of J. A. Quisenberry.

I am cashier of the First National Bank of Danville, and have been since January, 1879, and during this time have also been recording clerk of the minutes of the board of directors of said bank at their meetings. I file herewith a correct copy of the minutes of the board of directors of said bank relating to transactions had with the National Bank of Lancaster,
249 on a meeting held September 21st, 1880, and the other of a meeting held September 28th, 1880.

Said copy of said minutes is marked X Y. The numbers in said copy (6241 and 6242) refer to the debts for $5,551 and $3,575, referred to in the pleadings and exhibits in this case.

The explanatory agreement referred to in the minutes of the board of September 28, 1880, is shown by the copy of it, marked

"Exhibit A," and marked "Filed Feb'y 25, '81," and filed with some of the pleadings in the case. The original being held by the said First National Bank of Danville.

The transfers, as evidenced by Exhibit B and C, are
250 authorized in said minutes of the board meeting of September 28, 1880, to be signed by M. J. Farris, president, but signed by me as cashier, and were so signed by me under the following circumstances: Said copies of assignments were sent to or handed to me with the request that they should be promptly signed and returned by the next day's mail to Lancaster, and Mr. Farris not being in the bank at the time, or during the remainder of the day after I had received them, I, after consultation with our assistant cashier, Mr. Cheek, concluded that my signing them would be all that was necessary, overlooking the fact that Mr. Farris, as president, was authorized, in the minutes of the board meeting of September 28, 1880, alone to sign such transfer.

J. A. QUINSEBERRY.

Statement of M. J. Farris.

I am president of the First National Bank of Danville, and state that I executed the transfers to National Bank of Lancaster, marked E and H, respectively, in accordance with the order of the board of directors of the First National Bank of Danville, held September 28, 1880. Said transfers are filed here-
251 with, and dated this day, 10th March, 1881.

M. J. FARRIS.

We agree that the foregoing statements of J. A. Quisenberry and M. J. Farris may be read as depositions in this case, subject to all legal exceptions as to competency and relevancy.

W. D. HOPPER,
For Plaintiffs and Defendants to the Counter-Claim.
ANDERSON & HERNDON,
For National Bank of Lancaster.

252 On the 30th day of April, 1881, the plaintiffs, Jno. W. Miller, &c., executed the following supersedeas bond:

Supersedeas Bond.

JNO. W. MILLER, &c., Appellants,	Upon an appeal from a judgment of the Lincoln circuit court, rendered 15th April, 1881.
vs.	
JNO. MEYER, &c., Appellees.	

Whereas said appellants, S. D. Miller, E. B. Miller, Jno. W. Miller, and Susan Miller, have taken an appeal from the judg-

ment of the Lincoln circuit court rendered at its March term, 1881, against them in favor of the appellees, for the possession of a tract of land in Boyle county, containing 486 acres, 2 roods, and 31 poles, and the appellants desire to supersede the said judgment above mentioned. Now we, said appellants, principal, and W. S. Miller and Thos. Peacock, sureties, do hereby covenant to and with the appellee, the National Bank of Lancaster, Kentucky, that the appellants will pay the appellee all costs that may be adjudged against the appellants on the appeal, and also that they will satisfy and perform the said judgment above stated in case it shall be affirmed, and any judgment or order which the court of appeals may render, or order to be rendered by
253 the inferior court in lieu of the judgment aforesaid. And also pay all rents, hire, or damage which, during the pendency, of the appeal, may accrue on any part of the property of which the appellee is kept out of possession by reason of the appeal.

Witness our hands, this 30th day of April, 1881.

JNO. W. MILLER.
E. B. MILLER.
SUSAN MILLER.
S. D. MILLER.
(Latter three by Jno. W. Miller, attorney-in-fact.)
W. S. MILLER.
THOS. PEACOCK,

Att.: J. B. BAILEY, *Clerk.*

The following is a copy of supersedeas which issued herein, and the return of the officer thereon:

Lincoln Circuit Court.

S. D. MILLER, &c., Appellants,
vs.
JNO. MEYER, &c., Appellees.
} Supersedeas.

The appellants having executed a supersedeas bond with good and sufficient security, (the undersigned having satisfied
254 himself of the solvency of the security after a careful examination of witnesses introduced by both parties,) in my office, the appellees, Jno. Meyer, and the National Bank of Lancaster, and all other persons, are commanded to stay proceedings on the judgment herein appealed from.

This April 30th, 1881.

J. P. BAILEY,
Clerk, Lincoln Circuit Court.

Executed on the within named National Bank of Lancaster by delivering a true copy of the within to Geo. Denny, Sr., president of said bank, May 4, 1881.

J. M. HIGGINBOTHAM, *S. G. Co.*

Executed on Jno. M. Meyer, May 10, 1881, by delivering him a copy of the within supersedeas.

F. M. SUMATE,
Jailor, Boyle County.

The following is a copy of the notice of the filing of assignment of errors and schedule, together with returns of the officers thereon:

Lincoln Circuit Court.

S. D. MILLER, &c., Plaintiffs,
vs.
JOHN MEYER AND THE NATIONAL BANK OF LANCASTER, Defendants.

255 THE NATIONAL BANK OF LANCASTER, Plaintiff.
vs.
S. D. MILLER, &c., Defendants. } On Counter-Claim.

The said National Bank of Lancaster and John Meyer are notified that we have filed in the clerk's office of said court our assignment of errors and schedule in the above-named case.

This April 29, 1881.

S. D. MILLER.
JNO. W. MILLER.
E. B. MILLER.
SUSAN MILLER.

Executed by handing a true copy of the within notice to Geo. Denny, president of the National Bank, Lancaster of June 25, 1881.

J. M. HIGGINBOTHAM, *S. G. Co.*,
By H. ROTHWELL, *D. S.*

Lincoln Circuit Court.

S. D. MILLER, &c., Plaintiffs,
vs.
JOHN MEYER, &c., Defendants. } On Petition.

256 THE NATIONAL BANK OF LANCASTER, Plaintiff,
vs.
S. D. MILLER, &c., Defendants. } On Counter-Claim.

Said John Meyer and the National Bank of Lancaster are notified that we have filed our assignment of errors and schedule in the above-named case.

This April 29, 1881.

S. D. MILLER.
J. W. MILLER.
E. B. MILLER.
SUSAN MILLER.

Executed on Jno. Meyer, June 26, 1881, by delivering him a copy of the within notice.

F. M. SHUMATE,
Jailor, Boyle Co.

On the 29th day of April, 1881, the plaintiffs on petition, and the defendants on counter claim in the foregoing case, filed their schedule here in the clerks office of the Lincoln circuit court, which is as follows, to wit:

J. P. BAILEY,
Clerk, Lincoln Circuit Court.

S. D. MILLER, &c., Plaintiffs,
vs.
JNO. MEYER, &c., Defendants.
} On Petition.

and

THE NATIONAL BANK OF LANCASTER,
Plaintiff,
vs.
S. D. MILLER, &c., Defendants.
} On Counter-Claim.

Schedule.

257 The clerk of the Lincoln circuit court will copy the following papers into the transcript of the record for the court of appeals, to wit:

1. All the pleadings of both parties on the petition or on the counter-claim.
2. All the orders, as of the pleadings, and all the orders and judgment in the case.
3. All the exhibits referred to by either party in their pleadings.
4. The order granting injunction, the summons and injunction, and service on same.
5. All the depositions, affidavits, deeds, and agreements used as evidence by either party.
6. The transcript of the record from the Boyle circuit court, also copy record from same court.
7. The bill of exceptions, exceptions to depositions and proofs, and all evidence referred to in bill of exceptions.
8. The assignment of errors and this schedule.

258 This April 29th, 1881.

HOPPER & W. O. BRADLEY, *Att'ys.*

I, James P. Bailey, clerk of the Lincoln circuit court, do certify that the foregoing 244 pages and this page contain a true copy of the record, as directed by the schedule, in the case mentioned in the caption.

Given under my hand, as clerk of the court aforesaid, this 22d day of January, 1881.

J. P. BAILEY, *Clerk.*

259 And afterwards, to wit, at a court of appeals held for the commonwealth of Kentucky, at the capitol, in the city of Frankfort, on the 25th day of February, 1882.

Order Submit.

This cause came on and was heard, but the court not being sufficiently advised took time.

And afterwards, to wit, at a court of appeals held for the commonwealth of Kentucky, at the capitol, in the city of Frankfort, on the 15th day of June, 1882.

Judgment.

The court being sufficiently advised, it seems to them that there is no error in the judgment herein.

It is therefore considered that said judgment be *affirmed*, which is ordered to be certified to said court.

It is further considered that appellees recover of appellants their cost herein expended.

The opinion of said court is as follows, viz.:

Opinion.

John W. Miller was indebted to the National Bank of
260 Lancaster in the sum of $12,800, Miller became insolvent and made an assignment for the benefit of creditors, and in January, 1879, his creditors, the bank among them, released him from all liability upon the payment of a sum much less than the real indebtedness.

S. W. Miller, the father of John Miller, became embarrassed about the same time and conveyed his estate in trust to M. J. Durham for the benefit of his creditors. S. W. Miller was indebted to the National Bank of Danville in a large sum of money, and his son John was on his paper for the sum of about $7,500 to that bank. The Danville Bank had not released John from this liability on that paper.

The sale of the land of S. Williams was made under the deed in an action by the trustee for the settlement of the trust estate, and the National Bank of Danville became the purchaser. The sale was reported and confirmed, and a deed made to the
261 bank approved by the court and recorded. After this the National Bank of Lancaster, after the release of its claim on John Miller, believing that the bank could be made whole by the arrangement, purchased of the National Bank of Danville its claims on John and S. W. Miller, or rather obtained

a conveyance from that bank of the greater part of the land it bought belonging to S. W. Miller for the consideration price of $13,945. The Millers were in possession of the land under some arrangement with the trustee Durham or the bank, and when their term expired a writ of possession was issued in favor of M. J. Durham, trustee, at the instance of the banks, for the possession, the writ issuing in the action instituted by Durham for the settlement of Miller's estate. An injunction was obtained by the Millers preventing the execution of the writ, because the sale and conveyance by the bank at Danville to the bank at
262 Lancaster was void by reason of the provisions of the national banking act prohibiting national banks from dealing in real estate, except to secure debts previously contracted, or as may be purchased to secure debts, &c. Without discussing the effect of the purchase made by the bank at Lancaster, it may be proper to inquire what interest has the appellants in the subject-matter of this controversy.

The Danville National Bank had the right to purchase the lands in satisfaction of its debts; that sale has been confirmed, and a deed made divesting the appellant, S. W. Miller, of all title, yet the conveyance by the Danville bank to the Lancaster bank can in no manner affect the appellants, and we perceive no reason why the bank at Danville cannot place any person in possession, natural or artificial, it may see proper; and if the bank at
263 Lancaster had no right to the writ, the stronger the reason for permitting the writ to issue in the name of Durham, trustee.

Both banks are willing that he shall have the possession, and how the rights of Miller or the appellants are affected by it we cannot see.

If the sale to the one bank by the other is void, and we do not so decide, it belongs to the National Bank of Danville, and that bank endorses the writ or consents to its issue. The real owner is making no complaint, nor even before the court in this case; but, on the contrary, the record shows, is willing that Durham in his own right, or as the agent of the Lancaster bank, shall take possession.

The injunction was properly dissolved, and the question as to the validity of the sale need not be determined.

264 Judgment *affirmed.*

And afterwards, to wit, at court of appeals held for the commonwealth of Kentucky, at the capitol, in the city of Frankfort, on the 24th day of June, 1882.

Order extending time for filing Petition for Rehearing.

"Ordered, that the time for filing petition be extended to the first Monday in September next."

And afterwards, to wit, at a court of appeals, began and held for the commonwealth of Kentucky, at the capitol, in the city of Frankfort, on the 4th day of September, 1882, came appellants, by counsel, and filed their petition for a rehearing of this cause.

Order to file Petition for Rehearing.

"Came appellees, by counsel, and filed their response to said petition."

And again, at a court of appeals, held, as aforesaid, on the 9th day of September, 1882.

Order to overrule Petition for Rehearing.

"The court being sufficiently advised, it is considered that the petition herein for a rehearing be overruled."

265 *Petition for Writ of Error.*

To the Honorable Thoms F. Hargis, chief justice of the court of appeals of the commonwealth of Kentucky:

And now comes S. D. Miller, E. B. Miller, John W. Miller, and Susan Miller, by their attorneys, and complain that in the record and proceedings, and also in the rendition of a judgment in a suit between them as appellants and the National Bank of Lancaster and John Meyer as appelless, in said court of appeals, being the highest court of law or equity in said State in which a decision could be had in said suit, and in which a final judgment was rendered against them June 15th, 1882, which was suspended by order of said court, and a petition for a rehearing, which was duly overruled September 9th, 1882, at which date said judgment took effect and became final, wherein was drawn in question the construction of a statute of the United States, and the decision
266 was against the title, right, privilege, or exemptions specially set up and claimed under such statute, all which appears in the record and proceedings in said suit—a manifest error hath happened, to the great damage of the said S. D. Miller, E. B. Miller, John W. Miller, and Susan Miller.

Wherefore they pray for the allowance of a writ of error to the Supreme Court of the United States, and such other process as may cause the same to be corrected by said Supreme Court.

W. O. BRADLEY and
W. P. D. BUSH,
Attorneys.

Writ of error allowed October 9th, 1882.

THOMAS HARGIS, *Chief Justice.*

Endorsed: Filed October 31st, 1882. Att. Thomas J. Henry, C. C. A. By Thomas G. Poore, D. C.

267 *Writ of Error.*

UNITED STATES OF AMERICA, } ss:
District of Kentucky. }

The President of the United States, to the Honorable the Judges of the Court of Appeals of the Commonwealth of Kentucky, greeting:

Because in the records and proceedings, and, also, in the rendition of the judgment, of a plea which is in the said court of appeals before you, or some of you, being the highest court of law or equity of the said State, in which a decision could be had in said suit, between S. D. Miller, E. B. Miller, John W. Miller, and Susan Miller, appellants, and the National Bank of Lancaster and John Meyer, appellees, wherein was drawn in question the construction of a statute of the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such statute, a manifest error
268 hath happened to the great damage of the said S. D. Miller, E. B. Miller, John W. Miller, and Susan Miller, as by their complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with the writ, so you may have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record of proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the honorable M. R. Waite, Chief Justice of
269 the Supreme Court of the United States, the 9th day of October, in the year of our Lord, one thousand eight hundred and eighty-two.

[SEAL.] THOMAS B. FORD,
Clerk of the Circuit Court for the Sixth Circuit and District of Kentucky, at Frankfort, Kentucky.

Allowed October 9th, 1882.
THOMAS F. HARGIS, *Chief Justice.*

1882, October 9th, filed. T. J. HENRY, *C. C. A.*

Certificate of Chief Justice of the Court of Appeals.

S. D. Miller, E. B. Miller, John W. Miller, and Susan Miller, having prosecuted a writ of error to the Supreme Court of the

United States, to reverse the judgment of the court of appeals of the Commonwealth of Kentucky, rendered June 15th, 1882, affirming the judgment of the Lincoln circuit court of April 15, 1881, adjudging that the National Bank of Lancaster re-
270 cover of the said S. D. Miller, E. B. Miller, John W. Miller, and Susan Miller, the 486 acres 2 roods 31 poles of land in controversy herein, and awarded a writ of possession in favor of said bank therefor, said judgment of said court of appeals having been suspended by order of said court, and a petition for a rehearing filed therein, up to September 9th, 1882, at which date said petition was overruled and said judgment took effect, and became final against the said S. D. Miller, &c.

It is now hereby certified that in the record proceedings, and, also, in the rendition of the judgment of said court of appeals aforesaid, was drawn in question the construction of a statute of the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such statute by the said S. D. Miller, E. B. Miller, John W. Miller, and Susan Miller, in said court of appeals, that being the
271 highest court in said State in which a decision could be had in said suit, and in which the final judgment was rendered against the said E. B. Miller, &c., as aforesaid.

Given under my hand as chief justice of the court of appeals of the Commonwealth of Kentucky, this 9th day of October, 1881. THOMAS F. HARGIS, *Chief Justice.*

Endorsed; Filed October 31, 1882.
Attest: T. J. HENRY, *C. C. A.*

Citation.

UNITED STATES OF AMERICA, *ss:*

To the National Bank of Lancaster and John Meyer, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the court of appeals of the Commonwealth of Kentucky, wherein S. D. Miller, E. B. Miller,
272 John W. Miller, and Susan Miller, plaintiffs, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Thomas F. Hargis, chief justice of the court of appeals of the Commonwealth of Kentucky, this 9th day of October, 1882.

THOMAS F. HARGIS,
Chief Justice.

On this 11th day of October, 1882, personally appeared John M. Higginbotham, sheriff of Garrard county, Kentucky, before me, the undersigned, notary public for Garrard county, Kentucky, and makes oath that he delivered a true copy of the foregoing citation to George Denny, Sr., president of the National Bank of Lancaster, therein named, on the 11th day of October, 1882. JOHN N. HIGGINBOTHAM, *S. G. C.*

Subscribed and sworn to before me.

Given under my hand, as notary public, as aforesaid, October 11th, 1882.

H. C. KAUFFMAN, *N. P.* [SEAL.]

Citation.

UNITED STATES OF AMERICA, *ss*:

273 To the National Bank of Lancaster and John Meyer, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the court of appeals of the Commonwealth of Kentucky, wherein S. D. Miller, E. B. Miller, John W. Miller, and Susan Miller are plaintiffs, and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Thomas F. Hargis, chief justice of the court of appeals of the Commonwealth of Kentucky, this 9th day of October, 1882.

THOMAS F. HARGIS,
Chief Justice.

On this 11th day of October, 1882, personally appeared
274 F. M. Shumate, before me, the undersigned, notary public for Boyle county, Kentucky, and makes oath that he delivered a true copy of the foregoing citation to John Meyer, therein named, on the 11th day of October, 1882.

F. M. SHUMATE,
Jailer, Boyle Co.

Subscribed and sworn to before me.

Given under my hand, as notary public aforesaid, Oct. 11, 1882.

[SEAL.] T. P. YOUNG,
Notary Public in and for Boyle County, Kentucky.

Endorsed: Filed October 31, 1882.

Attest: THOMAS J. HENRY, *C. C. A.*

Bond.

Whereas S. D. Miller, E. B. Miller, John W. Miller, and Susan Miller, have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment of the court of appeals of the Commonwealth of Kentucky of June 15th, 1882, affirming the judgment of the Lincoln circuit court of April 15th, 1881, adjudging that the National Bank of Lancaster recover of said
S. D. Miller, E. B. Miller, John W. Miller, and Susan
275 Miller, the 486 acres 2 roods and 31 poles of land in controversy, and awarding a writ of possession against them and in favor of said National Bank of Lancaster therefor, and the said S. D. Miller, E. B. Miller, John W. Miller, and Susan Miller, desiring to supersede the said judgment of the said court of appeals of the Commonwealth of Kentucky:

Now, we, the said S. D. Miller, E. B. Miller, John W. Miller, and Susan Miller, principals, and W. S. Miller and Thomas Peacock, sureties, hereby covenant to and with the said National Bank of Lancaster and John Meyer that they, the said S. D. Miller, E. B. Miller, John W. Miller, and Susan Miller, shall prosecute their said writ of error to effect, and answer all damages and costs if they fail to make good their plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

S. D. MILLER, by W. P. D. BUSH, *Attorney.*
E. B. MILLER, by W. P. D. BUSH, *Attorney.*
JOHN W. MILLER, by W. P. D. BUSH, *Attorney.*
SUSAN MILLER, by W. P. D. BUSH, *Attorney.*
W. S. MILLER, by W. P. D. BUSH, *Attorney.*
THOS. PEACOCK, by W. P. D. BUSH, *Attorney.*

276 Taken and acknowledged before me, this 9th day of October, 1882, the powers of attorney authorizing W. P. D. Bush to sign the foregoing names to the foregoing bond being appended thereto.

[SEAL.] THOMAS B. FORD,
Clerk U. S. Circuit Court, District of Ky.

This bond is approved. Oct. 9th, 1882.

THOMAS HARGIS,
Chief Justice of Kentucky.

STATE OF KENTUCKY, }
Court of Appeals, Clerk's Office. }

I, Thomas J. Henry, clerk of the court aforesaid, certify that the foregoing bond is signed by the same parties who executed ap-

peal bond in the court of appeals of Ky., which was proved by said court this October 18th, 1882.

T. J. HENRY, *C. C. A.*

The foregoing bond is approved, to operate as a supersedeas, on being filed in the office of the clerk of the court of ap-
277 peals of Kentucky. STANLEY MATHEWS,
Associate Justice Supreme Court of the U. S.

Oct. 21, 1882.

Endorsed: Filed October 31, 1882.

Attest: THOMAS J. HENRY, *C. C. A.*

I, Thomas J. Henry, clerk of the court of appeals, in the Commonwealth of Kentucky, do certify that the foregoing and annexed two hundred and sixty-six pages contain a true and complete transcript of the record of the cause therein set forth of S. D. Miller and others against the National Bank of Lancaster, &c., as is on file in my office, except the record of the proceedings on the motion to dismiss for insufficient surety on the supersedeas bond and the appellant's petition for rehearing, not copied into this transcript by order of appellee's counsel.

Witness my hand and seal of office, at office, in the city of Frankfort, this 31st Oct., 1882.

[SEAL.] THOMAS J. HENRY, *C. C. A.*,
By THOMAS G. POORE, *D. C.*

Endorsed on cover: Kentucky court of appeals. No. 1173. S. D. Miller, E. B. Miller, John W. Miller, and Susan Miller, plaintiffs in error, *vs.* The National Bank of Lancaster and John Meyer. Filed 2d December, 1882.

11-542
10

Supreme Court of the United States.

OCTOBER TERM, 1882.

No. 1173

S. D. MILLER, E. B. MILLER, JOHN W. MILLER, AND SUSAN MILLER, PLAINTIFFS IN ERROR,

vs.

JOHN MYER AND THE NATIONAL BANK OF LANCASTER.

Error to the Court of Appeals of the State of Kentucky.

MOTION TO DISMISS

AND

BRIEF OF ARGUMENT ON BEHALF OF DEFENDANTS IN ERROR.

R. T. MERRICK,
M. F. MORRIS,
Of Counsel for Defendants in Error.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

OCTOBER TERM, 1882.

No. 1173

S. D. MILLER, E. B. MILLER, JOHN W. MILLER, AND SUSAN MILLER, PLAINTIFFS IN ERROR,

vs.

JOHN MYER AND THE NATIONAL BANK OF LANCASTER.

Error to the Court of Appeals of the State of Kentucky.

MOTION TO DISMISS FOR WANT OF JURISDICTION.

John Myer and the National Bank of Lancaster, the defendants in error in the above-entitled cause, come, by R. T. Merrick, their attorney, and move the court to dismiss the writ of error sued out in said cause.

And for grounds of this motion, said defendants respectfully show, that this court is without jurisdiction in the premises to hear the said writ of error: that, in the decision of the court of appeals of the State of Kentucky to reverse which said writ of error has been sued out, no Federal question is involved; and that, in the adjudication of the cause by said court of appeals, no construction of any statute of the United States was drawn in question, and no right, title,

privilege, or exemption claimed under any such statute or under the Constitution of the United States, was denied to the plaintiffs in error.

All of which, with other grounds in support of this motion, will more fully and at large appear by reference to the transcript of the record of said cause, and the Brief of Argument herewith filed.

R. T. MERRICK,
Attorney for Defendants in Error
for the purposes of this motion.

Supreme Court of the United States,

OCTOBER TERM, 1882.

No. 1173

S. D. MILLER, E. B. MILLER, JOHN W. MILLER, and SUSAN MILLER, *Plaintiffs in Error,*

vs.

JOHN MEYER, and THE NATIONAL BANK OF LANCASTER.

Error to the Court of Appeals of the State of Kentucky.

MOTION TO DISMISS WRIT OF ERROR FOR WANT OF JURISDICTION.

BRIEF OF ARGUMENT ON BEHALF OF DEFENDANTS IN ERROR.

I.

STATEMENT OF CASE.

The National Bank of Danville in the State of Kentucky had claims against one S. W. Miller (subsequently deceased) and his son, John W. Miller, one of the plaintiffs in error,—both of them citizens of the State. Both became insolvent; and both made assignments to trustees for the benefit of creditors. M. J. Durham, trustee under the assignment from S. W. Miller, instituted legal proceedings to enforce the assignment; and an order or decree of court was ren-

dered for the sale of the property mentioned in the assignment. At the sale, the National Bank of Danville, in order to secure its own claim, became the purchaser of a part of the property; and its purchase was ratified by the court, and a conveyance was duly executed and delivered to it.

John W. Miller, in his assignment, provided for the payment of claims against him held by the National Bank of Danville, the National Bank of Lancaster, and other creditors; and for his release from all further liability, except as to the claim of the National Bank of Danville. And to this the creditors, including the National Bank of Lancaster, assented. The Bank of Lancaster failed to realize the larger part of its claim; and in order, if possible, to reimburse itself for its losses, it contracted with the Bank of Danville to purchase from the latter the land of S. W. Miller which the Danville Bank had bought, as already stated; and at the same time to take an assignment to itself from the Danville Bank of the claim of the latter against John W. Miller. It was the intention of the Bank of Lancaster, and its expectation in this transaction, that, by a resale of the property, it would be able to reimburse itself for its losses with John W. Miller.

A writ of possession was then applied for and issued in the suit instituted by Durham, trustee; and the writ was issued in the name of the trustee, with the concurrence and consent of the Bank of Danville and for the use of the Bank of Lancaster.

Thereupon, the present plaintiffs in error, of whom S. D. Miller and E. D. Miller, children of S. W. Miller, claimed to be in possession of the property; and as it appears under a lease to them from their father which had expired, and of whom John W. Miller also claimed to be in possession, under what pretense does not appear, petitioned for a writ of injunction against the execution of the writ of possession, upon the sole ground that the Bank of Lancaster was prohibited by the National Banking Act (Revised Statutes

of the United States, Sec. 5137) from acquiring title to the property under the circumstances, and that, therefore, the conveyance to it by the Bank of Danville was null and void.

Both the local and the appellate court decided against the pretensions of the petitioners and in favor of the bank and of its co-defendant, the sheriff, who had been charged with the execution of the writ of possession. The court of appeals, in its decision, held that it was unnecessary to decide the question of the validity of the sale to the Bank of Lancaster; that the petitioners had no title whatever in or to the property, and no interest in the subject matter; that their father's title, under which they claimed, had been divested in favor of Durham, the trustee; and that the issue of the writ of possession in his favor, for the use of the grantees from him, was perfectly right and proper. It thereupon affirmed the judgment of the lower court, and awarded a writ of possession in favor of Durham and his grantees. It is this decision which it is sought to reverse by the present writ of error.

II.

BRIEF OF ARGUMENT.

Under the circumstances stated, it is difficult to ascertain what ground there is for the intervention of this Court.

The plaintiffs in error have no title to the property with which they assume to interfere. They claim no right, title, interest, privilege, or exemption under the Constitution or laws of the United States which the State court has denied to them, unless indeed it be their privilege to rove around the world, in the spirit of knight errantry, against the claims of others without any shadow or pretense of right on their own part. The record shows conclusively that their father's title, the only one which they can pretend to claim, had

been vested in the trustee, Durham; that Durham had sold to the Bank of Danville; and that the Bank of Danville had sold to the Bank of Lancaster. And the ground of their complaint is that the last conveyance was null and void. Assuredly this pretense is too utterly preposterous to need more for its refutation than the mere statement of it.

There are three or four propositions of law that are plainly applicable to this case:

1st. Plaintiffs, to entitle them to recovery in a suit, must show right and title in themselves, and cannot rely upon any want of right or title in defendants.

2d. Even if the title of the Bank of Lancaster was in violation of the Banking Act of the United States, which is not admitted, only the United States or the State of Kentucky, and no one else, could take advantage of the violation of the statute. Certainly no one, not claiming adversely to it, could take advantage of the defect, or pretended defect, in its title.

3d. If any Federal right could have been claimed at all in this case, it was the right of the bank to be protected in its purchase; and the decision of the court of appeals, therefore, instead of denying any Federal right, impliedly protected the rights of the bank under the Federal law.

4th. If, by a violent stretch of the imagination, it could be held that there was a questioning in this case of a Federal statute, yet the court expressly declined to decide that question, and determined the controversy by a decision of points within the peculiar and proper cognizance of a State court. Nor was its decision in any manner an evasion of the Federal, or pretended Federal, question. Moreover, the decision was plainly just.

To cite authorities in support of these propositions, would seem to be an unnecessary waste of time.

It is submitted that the writ of error should be dismissed.

R. T. MERRICK,
M. F. MORRIS,
Of Counsel for Defendants in Error.

OFFICE SUPREME COURT U. S.
FILED
JAN 2 1883
JAMES H. McKENNEY, CLERK

16-542

IN THE

SUPREME COURT

OF THE

UNITED STATES.

S. D. MILLER ET AL.

vs.

NATIONAL BANK OF LANCASTER.

Brief in Opposition to Motion to Dismiss.

The motion to dismiss for want of jurisdiction is placed, in substance, on two grounds—

First. That the plaintiffs in error claim no right, title, interest, privilege, or exemption under the Constitution or laws of the United States, which the State court has denied to them.

Second. That if the title of the Bank of Lancaster was in violation of the Banking Act, no one but the United States or the State of Kentucky could take advantage of the violation.

The writ of error seeks to reverse the judgment of the Court of Appeals of Kentucky, affirming the judgment of the lower court, adjudging that the National Bank of Lan-

caster recover of the plaintiffs in error 486 acres of land, and awarding a writ of possession therefor.

This ejectment proceeding was resisted by the children of Sam'l W. Miller, then in possession of the premises, on several equitable grounds, which cannot here be considered, and on the further ground that the Lancaster Nat'l Bank claimed title to the premises by deed of conveyance from the National Bank of Danville, which latter bank had purchased the land at a sale made under a deed of trust by their ancestor, S. W. Miller, now deceased, in a proceeding instituted in the Boyle Circuit Court by the trustee, under the deed, at September Term, 1880.

This conveyance to the Lancaster National Bank is assailed as void, under the National Bank Act, and conferring no title on which the parties in possession could be ejected, and for the reasons specifically set forth in the petition filed by them to restrain the execution of the writ.

In this petition, the cases in which national banks are authorized to acquire real estate are set forth, and it is then alleged that the conveyance in this case to the Lancaster Bank "was illegal, contrary to public policy, prohibited by the charter, and was and is void." (p. 3.)

In the answer and counter-claim of the Lancaster Bank, *inter alia*, it is said:

> "Defendant denies that its purchase of said land was illegal, or contrary to public policy, or prohibited by its charter, or was and is void, or that it is incapable of taking or holding the same." (p. 11.)

Judgment is prayed for recovery of possession and damages. (p. 15.)

After petition for injunction, answer, and counter claim, demurrer and reply thereto, rejoinder, demurrer to rejoinder, surrejoinder, rebutter, surrebutter, amended surre-

joinder, demurrer to surrejoinder, demurrer to rebutter, &c., the case was heard and judgment rendered 15 April, 1881, in which it is held, that "the conveyance by the First National Bank of Danville for the land in controversy is not void, and that the plaintiffs and defendants to counter claim of defendant, National Bank of Lancaster, have no right, title, or interest in said land in said deed, the United States through its proper officers alone having the right to enforce the forfeiture," &c. (p. 45.)

The writ of possession which had been granted was set aside as irregular, but a new writ was ordered to be issued for the National Bank of Lancaster, and it was adjudged that the bank recover from the defendants the land in controversy.

The case was then with bill of exceptions carried up to the Court of Appeals. There errors were assigned; the 3d being that the court erred in holding that the deed to the Lancaster National Bank was not void, and that the United States alone had the right to enforce the forfeiture. (p. 49.)

On 15th June, 1882, is the following entry: "The court being sufficiently advised, it is considered that said judgment be affirmed, which is ordered to be certified." (p. 111.)

This judgment was suspended on petition for rehearing until 9th September, 1882, when it was overruled, and the judgment became final.

On petition a writ of error was allowed by the Chief Justice of the Court of Appeals, 9th October, 1882, returnable to 2d Monday, October, 1883.

This brief statement shows how persistently and technically the question has been presented by the pleadings; whether the National Bank was not prohibited by law

from taking the title on which it sought to eject the parties in possession of the land.

This is not all—we add to this—the certificate of the Chief Justice of the Court of Appeals, who heard the case. "That in the record proceedings, *and also in the rendition of the judgment of said Court of Appeals*, was drawn in question the construction of a statute of the United States, and the decision was against the title, right, privilege, or exemption, specially set up, or claimed under such statute by the said S. E. Miller, E. B. Miller, John W. Miller, and Susan Miller." &c. (p. 115.)

In *Armstrong* vs. *Treasurer*, the opinion announces how the jurisdiction must be shown. In its fourth clause the certificate of the Chief Justice is referred to.

As to this, it is said:

> "In the case now before us the Supreme Court of Ohio has certified on the record that the validity of a statute of the State was drawn in question on the ground that it was repugnant to the Constitution of the United States, and that the decision was in favor of the validity of the statute, and the certificate of the judge is certified by the clerk as part of the record. We presume that the certificate of the presiding judge was made by authority of the court, and as this bill and answer show that such a point *might have arisen*, and this certificate states it did arise, and was decided the case comes within the fourth clause, and the court must take jurisdiction and examine whether the point so certified was rightfully decided."
>
> 16 Pet., 286.

In *Lawler* vs. *Walker*, the court refused jurisdiction, saying:

> "We cannot find in the record, nor can it be inferred from any part of it—the certificate of the Supreme

> Court included—which of the statutes of Ohio were declared to be valid, which has been alleged to be in conflict with the Constitution of the United States."
>
> 14 How., 152.

In *Porter* vs. *Foley*, the court say the Federal question "may be ascertained either from the pleadings, or by bill of exceptions, or by a certificate of the court."

24 How., 414.

We do not maintain that the certificate of itself is conclusive on the question of jurisdiction, for this would enable the State court to confer jurisdiction.

The certificate, taken in connection with the pleadings, makes it certain that the question was raised and decided.

In *Caperton* vs. *Bowyer* it is said—

> "Undoubtedly such a certificate is entitled to much weight as showing that the question was decided by the court that gives it, and in the manner required to give jurisdiction, but it is not conclusive to show that the question was raised in the case, as the latter question may depend upon the construction of the pleadings, or as in this case upon the proper construction of the language of the bill of exceptions."
>
> 14 Wall., 234.

Independent of the certificate, it is apparent that the pleadings present a question which must have been decided by the court when it affirmed the judgment of the court below, and determined that the Bank had the right to eject the heirs of J. W. Miller, on the title derived from the Bank of Danville, and on this motion it is not necessary to go into the enquiry as to the character of the title of the heirs. They had possession undisputed, and that was enough to authorize them to challenge the title of the Bank.

If, as we submit, the acquisition of title by the defendant

in error was in violation of an act of Congress, the plaintiffs in error had an exemption or immunity which they could properly invoke.

Railroad vs. *Richmond*, 15 Wall., 3;
Hall vs. *Jordon*, Id. " 163.

At the last term, in the case of *Swope* vs. *Atlas Nat. Bank*, a motion was made to dismiss, for want of jurisdiction. In this case, a party sought to enjoin a National Bank from selling property conveyed to it, as he alleged, in violation of the law. His bill was dismissed by the State Court, and he sued out his writ of error to this court. The motion to dismiss was overruled, the court holding *they had jurisdiction.*

Again it is maintained that, admitting the title of the bank was in violation of the Banking Act of the United States, only the United States could take advantage of it.

We are aware of the cases in which this has been determined. They go a great way in abolishing the doctrine trine of *ultra vires*, as applied to corporations. These decisions, as we believe, will be limited to the facts of each case, and the court will be more than willing to hear argument when a case can be distinguished from those already decided.

However, we are now dealing alone with a *motion to dismiss*, and if the case presents a Federal question, the fact that such question has already been decided is no ground for a dismissal.

Reliance is also had on the *opinion* of the court, in which it is said it was not necessary to decide upon the title of the Bank of Lancaster, inasmuch as the title to the Danville Bank was valid.

But the party seeking to enforce the ejectment and recover the land was the Bank of Lancaster. The Danville

Bank had parted with all title and interest. It is not a party to the suit, and we repeat, therefore, the case could not be determined in favor of the Bank of Lancaster without a consideration of its title.

If, then, by the pleadings, judgment, and certificate of the court, there is shown a federal question necessary to the decision of the case, the fact that it does not so appear in the grounds of the opinion is not material.

It was early decided that the opinion of the State court could not be looked to as the *foundation* on which this court would either take or *refuse jurisdiction*.

Rector vs. *Ashley*, 6 Wall., 142;
Williams vs. *Norris*, 12 Wheat., 117;
Citizen's Bank vs. *Board of Liq.*, 98 U. S. 140.

In conclusion we submit that this court is not called on to investigate this voluminous record on a motion to dismiss, made a year before the writ of error is returnable, on a record filed by the defendant in error, shown by the clerk to be incomplete.

The pleadings and the certificate of the Chief Justice are certainly sufficient, if not for the absolute denial of the motion, at least for the postponement of its ~~decree~~ determination until the cause is heard and the case fully explored.

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